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Ninth Circuit Survey—Criminal Law in the Ninth Circuit: Recent Developments, Parts I, II, & III

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I. ARREST, SEARCH, AND SEIZURE

A. Scope of the Fourth Amendment

1. Expectation of privacy

A person is protected by the fourth amendment when his legitimate expectation of privacy has been violated by an unlawful search or seizure.¹ For purposes of the fourth amendment, standing is equivalent to an expectation of privacy; one does not have standing unless one's reasonable expectation of privacy has been violated by a search or seizure.² An expectation of privacy consists of a person's subjective expectation tempered by society's objective consideration that the expect-

1. *United States v. Salvucci*, 448 U.S. 83, 93 (1980) (defendants Salvucci and Zackular failed to show an expectation of privacy in an apartment, rented by Zackular's mother, where stolen mail was found); *Rakas v. Illinois*, 439 U.S. 128 (1978) (automobile passengers did not have a legitimate expectation of privacy in car's glove compartment nor under car's seat). The Court in *Rakas* stated: "[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." 439 U.S. at 143 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)); see *infra* note 3 and accompanying text.

2. *United States v. Salvucci*, 448 U.S. at 93. The *Salvucci* Court rephrased the standing issue by stating that the question is "not merely whether the defendant had a possessory

tation is reasonable.³

a. containers

In *Illinois v. Andreas*,⁴ the Supreme Court decided that a warrantless reopening of a sealed container, in which drugs had been found during an earlier border search, did not violate the fourth amendment.⁵ When a large, locked metal container arrived at O'Hare International Airport from Calcutta, a customs officer opened it and found a table in which marijuana was concealed. The customs officer informed a Drug Enforcement Administration (DEA) agent who later confirmed that the substance was marijuana. The container was then resealed with the table inside. The next day, the DEA agent and a Chicago police officer posed as delivery men and delivered the container to the defendant, leaving it outside his door. While the police officer went to obtain a search warrant, the DEA agent kept the apartment under surveillance and observed the defendant take the package inside. Between thirty and forty-five minutes after the delivery, but before the officer returned with a warrant, the defendant left the apartment with the container and was immediately arrested by the agent. At the police station, the officers opened the container, without a warrant, and seized the marijuana inside the table.⁶

interest in the items seized, but whether he had an expectation of privacy in the area searched." *Id.*

3. *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, FBI agents' illegal wiretapping and recording of a bookmaker's conversations in a public phone booth violated the defendant's expectations of privacy in the conversations, because the defendant relied upon the privacy of the booth. The Court held that the test to determine whether a person had a reasonable expectation of privacy is that the person "exhibited an actual (subjective) expectation of privacy, and, . . . that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harland, J., concurring).

Relying on *Rakas* and *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Fifth Circuit has stated that factors to consider when analyzing one's expectation of privacy include: whether one has a "possessory interest in the thing seized or the place searched, whether [one] has the right to exclude others from that place, whether [one] has exhibited a subjective expectation that it would remain free from governmental invasion, whether [one] took normal precautions to maintain his privacy and whether [one] was legitimately on the premises." *United States v. Haydel*, 649 F.2d 1152, 1155 (5th Cir. 1981) (court held that defendant had an expectation of privacy in gambling records hidden in his parents' house under their bed) *cert. denied*, 455 U.S. 1022 (1982).

4. 103 S. Ct. 3319 (1983). Chief Justice Burger delivered the opinion in which Justices O'Connor, White, Blackmun, Powell, and Rehnquist joined. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. Justice Stevens also filed a dissenting opinion.

5. *Id.* at 3325.

6. *Andreas* was charged with two counts of possessing a controlled substance. *Id.* at 3322.

The trial court granted the defendant's motion to suppress the marijuana found inside the table.⁷ The appellate court affirmed and held that the defendant had a legitimate expectation of privacy in the shipping container.⁸ The court reasoned that since the police had failed to make a "controlled delivery," they needed a warrant to validly reopen and search the container.⁹

The United States Supreme Court reversed the decision of the appellate court.¹⁰ First, the Court recognized that the initial border search and the "controlled delivery"¹¹ were legal law enforcement techniques.¹² Second, Andreas' expectation of privacy in the contents of the container was extinguished when the officers legally opened it and discovered illicit drugs.¹³ Upon resealing the container to make a controlled delivery, the defendant's expectation of privacy was not revived.¹⁴ The Court analogized its holding to the reasoning underlying the plain view doctrine.¹⁵ Under the plain view doctrine, one does not retain a privacy interest in an item that falls within the plain view of an officer who has a legal right to be in the position to observe the object.¹⁶ Therefore, once the police discovered that the container concealed ma-

7. *Id.*

8. *Id.* See *People v. Andreas*, 100 Ill. App. 3d 396, 426 N.E.2d 1078 (1981).

9. 103 S. Ct. at 3322. Controlled deliveries occur in the following situations: when a carrier discovers contraband while inspecting luggage to learn the identity of the owner; when the drugs fall out of a broken piece of luggage; or when the carrier exercises his privilege to inspect packages upon justified suspicion. The contraband is restored to its container and then the carrier or police will deliver the resealed container to its owner. Once the owner accepts the delivery, he is arrested and the container is seized and searched a second time for the contraband that was earlier seen inside.

Id. at 3323 (citing *United States v. Bulgier*, 618 F.2d 472, 476 (7th Cir.), *cert. denied*, 449 U.S. 843 (1980)).

In *Bulgier*, an airport employee discovered cocaine in the defendant's suitcase and notified DEA agents, who identified the contraband. The court held that the initial seizure followed by a controlled delivery, in which the agent kept the suitcase under constant surveillance, created a constructive seizure which validated the second search of the suitcase after the defendant's arrest. *United States v. Bulgier*, 618 F.2d 472, 476 (7th Cir.), *cert. denied*, 449 U.S. 843 (1980).

10. 103 S. Ct. at 3322, 3325.

11. See *supra* note 9.

12. 103 S. Ct. at 3322-23.

13. *Id.* at 3323.

14. *Id.* at 3323-24.

15. *Id.* at 3324. Under the plain view doctrine, police can make a warrantless seizure of evidence that is within their plain view. If the discovery is inadvertent, and if the object is in a public place, and the officer has a legal right to be in the position to observe the item, then the officer's observation does not violate the fourth amendment. See *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971). The rationale behind the doctrine is that one does not have a privacy interest in something that can be seen by the public.

16. 103 S. Ct. at 3324.

rijuana, the contraband was like an object within the officer's plain view.¹⁷ Thus, the defendant's privacy interest in the illicit drugs was lost.¹⁸

In reversing the appellate court decision, the Supreme Court stated that a perfect controlled delivery was nearly impossible to attain in a criminal investigation.¹⁹ The chances that the container will be put to other uses or that contraband may be removed during a break in surveillance depends upon various factors: the length of the break; the nature and uses of the container; and "the setting in which the events occur."²⁰ Even though police cannot be absolutely certain that the contents of the container are the same, this fact is insufficient to restore or create a reasonable expectation of privacy in the container.²¹

Having held that a gap in surveillance does not automatically restore a privacy interest, the Court recognized the need for a standard to determine when an individual's expectation of privacy in a container is

17. *Id.*

18. *Id.* The Court stated that the owner may retain his title and possessory interest, but not his privacy. *Id.* In his dissenting opinion, Justice Brennan stated that this statement was "out of touch with the genius of the American system of liberties." *Id.* at 3327 (Brennan, J., dissenting).

Justice Brennan was astounded by the implications of the Court's decision. He essentially saw the majority as saying that a person loses his privacy interest in an item that has been seen in plain view whether the item is in the home or in public. *Id.* at 3327-28 (Brennan, J., dissenting).

Moreover, Justice Brennan claimed that the plain view doctrine "hurts rather than helps the Court's case." *Id.* at 3327 (Brennan, J., dissenting). The plain view doctrine necessarily implies that a fourth amendment search is involved but that an exception to the warrant requirement applies. Here, the majority should not have used the rationale of the plain view doctrine when it held that the fourth amendment did not apply because there was no fourth amendment search. He stated that the fact that a person displays incriminating evidence in plain view is not alone sufficient to authorize a search or seizure of the item. There must be an independent reason for intruding upon an individual's right to repose and security in his possessions. Usually, the plain view doctrine only justifies a search or seizure of an item if the authorities have probable cause to suspect the item is connected with criminal activity; the majority admitted this point. There would be no need for probable cause or for a discussion of probable cause, however, if there was no fourth amendment search. *Id.* at 3328 (Brennan, J., dissenting). Justice Brennan was making a semantic argument—the majority cannot analogize exceptions to the warrant requirement when it concludes that the fourth amendment was not triggered.

19. *Id.* at 3324. The Court recognized the police's problem of maintaining surveillance of the container they are trailing without being detected in their surveillance activities. *Id.*

20. *Id.*

21. *Id.* (citing *Arkansas v. Sanders*, 442 U.S. 753, 764-65 n.13 (1979)). In *Sanders*, the Court suggested that although police may not be certain of the contents of containers taken from automobiles, this lack of certainty does not prevent police searches of such containers. *Arkansas v. Sanders*, 442 U.S. 753, 764-65 n.13 (1979).

reinstated after an interruption in control or surveillance by police.²² The Court stated that a standard which would limit "the risk of intrusion on legitimate privacy interests is whether there is a substantial likelihood that the contents of the container have been changed during the gap in surveillance."²³

If there is not a substantial likelihood that the contents have been changed, there is not a legitimate expectation of privacy in the contents of a container which has been previously opened under lawful authority.²⁴ The Court concluded that because of the size of the container, its specialized purpose, and the short break in surveillance, there was not a substantial likelihood that the contents of the container had changed while it was in the apartment.²⁵ Hence, the defendant had no legitimate expectation of privacy in the container, and the reopening did not constitute a search within the scope of the fourth amendment.²⁶

In a dissenting opinion, Justice Brennan objected to the Court's labeling of the second search as a "reopening" rather than a search.²⁷ He stated that Andreas had a protected privacy interest in the contents of the container once it was delivered,²⁸ and that the majority had reduced the right of privacy to dependence upon secrecy.²⁹ Once the legal border search revealed the contraband, Andreas' reasonable expectation that the contraband would remain secret was lost and could not be restored.³⁰ Andreas' right to maintain the integrity of his container, however, was only temporarily waived when the box passed through customs. His privacy interest was not extinguished by the border search; it was merely suspended.³¹ Justice Brennan stated that the

22. 103 S. Ct. at 3324.

23. *Id.* at 3324-25. The majority stated that in fashioning this test, it considered three fourth amendment principles: (1) the standard must be workable for application by rank and file police officers; (2) it must be reasonable, which means it would be absurd to recognize an expectation of privacy where there is only a minimal probability that the contents of a container have been changed; and (3) the test should be objective and not dependent upon an individual officer's belief. *Id.* at 3324.

24. *Id.* at 3325.

25. *Id.* The container was out of the officer's sight for approximately thirty to forty-five minutes. After this time period, the defendant emerged from his apartment and was arrested.

26. *Id.* at 3324-25.

27. *Id.* at 3325 (Brennan, J., dissenting).

28. *Id.* at 3326 (Brennan, J., dissenting).

29. *Id.* (Brennan, J., dissenting). Justice Brennan stated that the fourth amendment does not "protect *only* information." It also protects the "*right to be let alone.*" *Id.* (Brennan, J., dissenting) (emphasis in original) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

30. 103 S. Ct. at 3326 (Brennan, J., dissenting).

31. *Id.* at 3326-27 (Brennan, J., dissenting). In *Michigan v. Tyler*, 436 U.S. 499 (1978),

initial search does not validate the subsequent warrantless search or render it a non-search.³²

Justice Brennan also objected to the Court's "substantial likelihood" test.³³ He indicated that if a person has no reasonable expectation of privacy in a container whose contents are legally known, then a person's expectation of privacy should be restored if he has unobserved access to the container and any opportunity to change its contents.³⁴ Because the container was within Andreas' possession, unobserved, for thirty to forty-five minutes, there was not a substantial likelihood that the container still contained contraband.³⁵ Justice Brennan stated that the Court's vague standard makes possible serious intrusions into a person's reasonable expectation of privacy.³⁶

Finally, Justice Brennan believed that the case did not fall within an exception to the warrant requirement.³⁷ The case did not present any of the conditions necessary to justify an exception, such as the need to preserve the safety of officers,³⁸ to prevent loss or destruction of evidence,³⁹ or to protect a compelling government interest.⁴⁰ When a legal search notifies suspects that they are objects of official interest, the exigent circumstances doctrine recognizes that any delay in obtaining a warrant may risk the destruction of evidence or the security of officers.⁴¹ In *Andreas*, the police officers who had searched the container were in the process of obtaining a search warrant but instead decided to conduct a warrantless search.⁴² There was no indication that the

the Court held that although a building fire and its immediate consequences are exigent circumstances which justify a warrantless search, any further investigations which occur after the exigent circumstances cease require a warrant. The fire merely suspends the privacy right; it does not extinguish it. 103 S. Ct. at 3326 (Brennan, J., dissenting).

32. *Id.* at 3327 (Brennan, J., dissenting).

33. *Id.* at 3329 (Brennan, J., dissenting).

34. *Id.* (Brennan, J., dissenting).

35. *Id.* (Brennan, J., dissenting).

36. *Id.* (Brennan, J., dissenting).

37. *Id.* at 3328 (Brennan, J., dissenting).

38. *Id.* (Brennan, J., dissenting). See *Chimel v. California*, 395 U.S. 752 (1969) (warrantless search incident to arrest is legal if confined to the area within defendant's immediate control, which means the area from which he might gain possession of a weapon or destructible evidence).

39. *Chambers v. Maroney*, 399 U.S. 42 (1970) (to preserve evidence in a car the automobile exception allows officers to conduct a warrantless search of a car incident to a lawful arrest or if there is probable cause).

40. *Carroll v. United States*, 267 U.S. 132 (1925) (dicta stating that officers may conduct warrantless vehicle and baggage searches at border to prevent entrance of illegal aliens or illegal goods).

41. 103 S. Ct. at 3328 (Brennan, J., dissenting).

42. *Id.* at 3329 (Brennan, J., dissenting).

agents' safety was jeopardized or that the evidence was going to be destroyed. In this situation, Justice Brennan did not see what interest the Court was vindicating by its decision.⁴³

In *United States v. Knotts*,⁴⁴ the Supreme Court held that use of beeper signals, which enabled police to trace a car to the defendant's cabin, did not violate the defendant's legitimate expectation of privacy.⁴⁵ Police suspected co-defendant Armstrong of purchasing chloroform to manufacture illicit drugs. Visual surveillance of Armstrong revealed that after he bought the chemical he delivered it to co-defendant Petschen. Prior to Armstrong's purchase, police had arranged with a chemical company to install a beeper in a five-gallon drum of chloroform that was sold to Armstrong. Armstrong transferred the drum to Petschen's car, which the officers began to follow by both visual and electronic means. After losing visual surveillance, the officers were forced to rely solely on the beeper signals, and traced the car to defendant Knotts' cabin in Wisconsin. After three days of visual surveillance of the cabin, the officers obtained a search warrant. In the cabin they found a clandestine drug laboratory which included chemicals, equipment and formulas for the production of amphetamines.

The trial court denied Knotts' motion to suppress the evidence based on the warrantless monitoring of the beeper.⁴⁶ Knotts was convicted of conspiring to manufacture controlled substances in violation of 21 U.S.C. section 846.⁴⁷ The Court of Appeals for the Eighth Circuit reversed and held that monitoring the beeper signals violated Knotts' reasonable expectation of privacy.⁴⁸ The court reasoned that the search moved from the public to the private sphere when the car left the highway and entered Knotts' property.⁴⁹

43. *Id.* (Brennan, J., dissenting). In his dissenting opinion, Justice Stevens appeared to agree with Chief Justice Burger that "absolute certainty" is not required by the fourth amendment. He seemed unwilling to say, however, that thirty to forty-five minutes was sufficient to reestablish a privacy interest. This determination involves a question of fact and hence he would remand to the trial court. *Id.* at 3329-30 (Stevens, J., dissenting).

44. 460 U.S. 276 (1983). Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Powell and O'Connor joined. Justice Brennan filed a concurring opinion in which Justice Marshall joined. Justice Blackmun filed an opinion concurring in the judgment, in which Justices Brennan, Marshall, and Stevens joined. Justice Stevens filed a concurring opinion in which Justices Brennan and Marshall joined.

45. 460 U.S. at 285.

46. *Id.* at 279.

47. 21 U.S.C. § 846 (1976) provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both"

48. 460 U.S. at 282. See *United States v. Knotts*, 662 F.2d 515, 518 (8th Cir. 1981), for opinion of lower court.

49. 460 U.S. at 284; 662 F.2d at 518.

Reversing the appellate court, the Supreme Court held that the police did not violate Knotts' expectation of privacy by monitoring the beeper signals after the car left the highway.⁵⁰ The Court indicated that the beeper surveillance was equivalent to following a car on public streets and highways.⁵¹ Although Knotts had the traditional expectation of privacy within his cabin, that expectation did not extend to the visual surveillance of Petschen's car "arriving on his premises . . . nor to the movements of objects such as the drum of chloroform outside the cabin in 'open fields.'" ⁵² The fact that the police used beeper signals in addition to visual surveillance did not prohibit the police from enhancing their senses with science and technology.⁵³ The Court's decision essentially approved using electronic devices to aid in detecting crime.⁵⁴

The Court disagreed with the defendant's claim that the search entered the private sphere. It noted that the government limited its use of the signals.⁵⁵ The signals were not used after the car ended its journey, nor were they used to obtain information as to the movement of the drum within the cabin, or any other type of information that would not have been visible to the naked eye.⁵⁶ Because the warrantless monitoring of the beeper signals did not invade Knotts' legitimate expecta-

50. 460 U.S. at 285. Knotts did not challenge the warrantless installation of the beeper in the chloroform container. *Id.* at 1084. He did not think he had standing with respect to this issue; hence the Court did not consider whether the installation of the beeper violated his expectation of privacy.

51. *Id.* at 281-82. It has been established that there is a lesser expectation of privacy in a car than in a home. A person who travels on the public highway is within plain view and thus has no legitimate expectation of privacy in his travels from one place to another. *See* *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (A car "travels on public thoroughfares where both its occupants and its contents are in plain view.").

52. 460 U.S. at 282 (citing *Hester v. United States*, 265 U.S. 57 (1924) (open fields, even though private property, are not protected by the fourth amendment)).

53. *Id.* at 285. Due to the driver's evasive driving tactics, police relied solely on beeper signals to locate the car which had arrived at Knotts' cabin.

54. *Id.* The Court stated that if the defendant's complaint was that scientific devices allow police to be more efficient in detecting crime, it had no "constitutional foundation." *Id.* at 282. Knotts also expressed his fear that the government might be able to conduct twenty-four hour surveillance without judicial supervision as a result of the Court's holding. *Id.* The Court stated that if police abuse such law enforcement techniques, then the Court will determine whether constitutional principles apply. *Id.* at 285.

55. *Id.*

56. *Id.* *See supra* note 53 and accompanying text. The Court suggested that the police did not discover any more information than they could have found by relying on visual surveillance. The facts, however, indicate that both visual surveillance and beeper monitoring were necessary to discover the location of the car and container. Petschen's evasive driving maneuvers made visual surveillance difficult. At times, the officers relied solely upon the beeper signals to ascertain the location of the container. *Id.* at 282.

tion of privacy, there was neither a search nor a seizure within the meaning of the fourth amendment.⁵⁷

Justice Brennan, with whom Justice Marshall joined in a concurring opinion, stated that the case would have been more difficult had *Knotts* challenged the installation of the beeper in the container.⁵⁸ Justice Brennan stated that he was not sure whether there was a constitutionally significant difference between planting a beeper inside an object owned by a criminal suspect and in arranging for the object containing a beeper to be sold to the suspect.⁵⁹ Justice Brennan reemphasized the principle that the fourth amendment protects against invasions of a person's legitimate expectation of privacy even if the invasion is not accompanied by a physical intrusion.⁶⁰ If the government does physically intrude upon a constitutionally protected area, then this intrusion may constitute a violation of the fourth amendment even if the same information could have been obtained by other, less intrusive means.⁶¹ By raising these principles, Justice Brennan suggests that the installation of the beeper may constitute a physical intrusion. Although the police in *Knotts* might have used visual surveillance,

57. *Id.* at 285.

58. *Id.* at 285-86 (Brennan, J., concurring). The police had arranged for a beeper to be placed in a container and for the chemical company to ensure that Armstrong receive that container. *Id.* at 278.

Justice Brennan stated that if *Knotts* was right in claiming that he lacked standing to challenge the installation of the beeper, then it only confirmed the "formalism and confusion in this Court's recent attempts to redefine Fourth Amendment standing." *Id.* at 287 (Brennan, J., concurring).

Apparently Justice Brennan believed that *Knotts* would lack standing to challenge the original installation only because the drum was not sold to him, but to Armstrong. If Armstrong were the only party who had standing, then the Court would seem to base standing upon one's possessory or property interest in an item, rather than their expectation of privacy in the item. *Id.* (Brennan, J., concurring). The Court has consistently recognized that a possessory interest in an item is not determinative of an expectation of privacy. See *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980); *Rakas v. Illinois*, 439 U.S. 128, 149-50 (1978).

59. 460 U.S. at 286 (Brennan, J., concurring). Justice Brennan was not satisfied with the Eighth Circuit's disposal of the installation issue. The appellate court had held that the chemical company's consent to the installation of the beeper met fourth amendment requirements even though the company intended to sell the bugged container to an unsuspecting customer. The Eighth Circuit stated that "the consent of the owner (of the chloroform container) at the time of installation meets the requirements of the Fourth Amendment, even if the consenting owner intends to soon sell the 'bugged' property to an unsuspecting buyer." *United States v. Knotts*, 662 F.2d 515, 517 n.2 (8th Cir. 1981). In response, Justice Brennan stated, with some sarcasm, that the government is not defending a claim for damages in an action for breach of warranty, but is attempting to justify the legality of a search conducted in the course of a criminal investigation. 460 U.S. at 286 (Brennan, J., concurring).

60. 460 U.S. at 286 (Brennan, J., concurring).

61. *Id.* (Brennan, J., concurring).

rather than electronic devices, to discover the location of the container, they may still have violated the fourth amendment by installing the beeper into a constitutionally protected area.⁶²

Justice Blackmun and Justice Stevens, in separate concurring opinions, objected to the Court's use of the "open fields" doctrine because the case did not concern an "open fields" issue.⁶³ Justice Stevens also emphasized that the use of electrical devices implicates sensitive concerns, although he did not find the electronic detection techniques used in this case to be objectionable.⁶⁴

In *United States v. Place*,⁶⁵ the Supreme Court held that the investigative procedure of subjecting luggage to a sniff test by a trained narcotics detection dog does not constitute a search within the meaning of the fourth amendment.⁶⁶ Law enforcement officers became suspicious of Place's behavior while he was waiting in line at Miami International Airport to purchase a ticket to New York's LaGuardia Airport. As Place went to the gate for his flight, the officers approached him and requested and received some identification. Place consented to a search of his luggage, but the agents decided against searching the bags because the plane was about to depart. The officers inspected the address tags on both his bags and noticed discrepancies in the two addresses. They later discovered that neither address existed.⁶⁷

Because of their encounter with Place, the Miami agents called

62. *Id.* (Brennan, J., concurring). Knotts would have to show that he had a legitimate expectation of privacy in the container.

63. *Id.* at 287 (Blackmun, J., concurring); *id.* at 288 (Stevens, J., concurring). Although both Justices Blackmun and Stevens believed that references to the open fields doctrine were dicta, neither one explained why the doctrine was not applicable. It may be that the container was not on public display due to the secluded location of the cabin. *Id.* at 287 (Blackmun, J., concurring); *id.* at 288 (Stevens, J., concurring). In addition, the facts do not indicate the length of time that the container was outside the cabin, which may show that the drum was not located in an open field. As Justice Stevens noted, the record did not support a finding that the container was in an open field. *Id.* at 288 (Stevens, J., concurring).

64. *Id.* (Stevens, J., concurring). Justice Stevens stated that the Court's suggestion that the police may augment their senses with science and technology was "unnecessarily broad dicta" because there may be situations in which the use of such devices violates the fourth amendment. *Id.* (Stevens, J., concurring) (citing *Katz v. United States*, 389 U.S. 347 (1967)); see *supra* note 3.

65. 103 S. Ct. 2637 (1983). Justice O'Connor delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Powell, Rehnquist, and Stevens joined. Justices Brennan and Blackmun filed separate concurring opinions, in which Justice Marshall joined.

66. *Id.* at 2644-45.

67. The bags were taken late on Friday afternoon. Thus, the agents retained the luggage over the weekend, and obtained a search warrant for the smaller bag on Monday. *Id.* at 2640.

DEA agents in New York to inform them of him. When Place arrived at LaGuardia Airport, his behavior aroused the suspicion of the New York DEA agents. The agents approached Place and told him that they believed he might be carrying narcotics. After Place refused to consent to a search of his luggage, one agent said that they would take his luggage to a federal judge to obtain a search warrant and that Place was welcome to join them. The agents then took the luggage to Kennedy Airport where it was subjected to a sniff test by a trained narcotics detection dog. The dog reacted positively to the smaller bag, but ambiguously to the larger bag. At this time, ninety minutes had passed since the initial seizure of the luggage. Keeping the luggage, the agents obtained a search warrant a few days later.⁶⁸ Upon searching the bags, the agents discovered 1125 grams of cocaine. Place was indicted for possessing cocaine with intent to distribute, in violation of 21 U.S.C. section 841(a)(1).⁶⁹

Place argued that the government's seizure of his luggage violated the fourth amendment unless it was based upon probable cause.⁷⁰ The government contended that a brief detention of luggage for purposes of further limited investigation was justifiable if based upon reasonable suspicion.⁷¹ The Supreme Court agreed, and held that a brief detention of luggage for exposure to a narcotics detection dog did not violate the fourth amendment, as long as it was based on reasonable suspicion.⁷²

The officers' purpose in detaining the luggage was to subject it to a dog sniff test.⁷³ The Court stated that if the sniff test constituted a search requiring probable cause, then the initial seizure would require

68. *Id.*

69. 21 U.S.C. § 841(a)(1) (1976) provides in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally . . . (1) to manufacture, distribute, or dispense, or possess with intent . . . to distribute . . . a controlled substance."

70. 103 S. Ct. at 2642-43.

71. *Id.* at 2641-42. Whereas probable cause would require a police officer to believe that there is a substantial probability that the luggage contains contraband or other evidence of a crime, reasonable suspicion merely requires a police officer to have reasonable articulable suspicion, derived from objective facts, that the property contains contraband or evidence of the crime. *Id.* at 2642.

72. *Id.* at 2639. In determining whether the detention was justifiable, the Court balanced the extent and nature of the intrusion upon Place's fourth amendment rights against the government's interest in temporarily seizing the luggage for purposes of a dog sniff search. The brief intrusion upon an individual's possessory interest caused by the seizure is minimal in comparison to the strong countervailing government interest in preventing drug-trafficking. *Id.* at 2642.

73. *Id.* at 2644.

probable cause.⁷⁴ The Court concluded, however, that the dog sniff did not constitute a search within the meaning of the fourth amendment.⁷⁵ The Court reaffirmed the principle that a person possesses a reasonable expectation of privacy in the contents of his luggage.⁷⁶ A dog sniff does not require opening of luggage, nor does it expose noncontraband items that would be exposed if an officer rummaged through the contents of the luggage.⁷⁷ Hence, this investigative procedure is much more limited, and much less intrusive than a typical search.⁷⁸ Moreover, the Court stressed that the information obtained from a canine sniff is limited; it merely reveals the presence or absence of contraband.⁷⁹ Subjection of luggage to a dog sniff test does not subject a property owner to the embarrassment or inconvenience involved in more intrusive investigative procedures.⁸⁰ Therefore, the Court concluded that the exposure of Place's luggage, in a public place, to a trained narcotics dog did not constitute a fourth amendment search.⁸¹

Despite its holding that the initial detention of Place's luggage was permissible, the Court excluded the evidence obtained from the subsequent search of his luggage.⁸² The Court emphasized that the brevity of the intrusion upon fourth amendment rights is important in determining whether the seizure was so minimally intrusive as to be justifiable upon reasonable suspicion.⁸³ The length of the detention rendered the seizure unreasonable in the absence of probable cause. The ninety minute detention of Place's luggage exceeded the limited authority of the police to briefly detain luggage reasonably suspected of containing narcotics.⁸⁴

74. *Id.*

75. *Id.* at 2644-45.

76. *Id.* at 2644 (citing *United States v. Chadwick*, 433 U.S. 1 (1977)). In *Chadwick*, the warrantless search of a footlocker which was within the exclusive control of federal agents violated the defendants' expectation of privacy in the contents of the footlocker. The Court noted that the defendants' privacy interest in the footlocker was not in the container itself, which was exposed to public view, but rather in the contents of the container. *United States v. Chadwick*, 433 U.S. 1, 13-14 n.8 (1977).

77. 103 S. Ct. at 2644.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 2644-45.

82. *Id.* at 2646.

83. *Id.* at 2645.

84. *Id.* In addition, the violation of Place's fourth amendment rights was increased by the agents' failure to inform him of the place to which they were transporting his luggage, the length of time they might retain his luggage, and the arrangements that might be made to return the luggage if no drugs were found. *Id.* at 2646.

In separate concurring opinions, Justice Brennan and Justice Blackmun both stated that the Court should not have addressed the issue of whether a canine sniff constituted a search within the meaning of the fourth amendment.⁸⁵ Both Justices noted that the validity of the canine sniff was not contested in the district court, nor was the issue raised in the court of appeals.⁸⁶

Relying on *United States v. Knotts*,⁸⁷ Justice Brennan contrasted the investigative use of electronic devices and canine sniffs.⁸⁸ In *Knotts*, the Court stated that the use of electronic techniques merely enhances the police's own sensory perception.⁸⁹ Unlike an electronic beeper, a dog does not merely enable a policeman to more efficiently discover information that he might obtain using his own senses.⁹⁰ A dog does not enhance the sensory perception, but rather adds a new dimension to human perception.⁹¹ Justice Brennan concluded, therefore, that the use of a narcotics detection dog represents a greater intrusion upon an individual's privacy than the use of electronic devices.⁹²

Justice Blackmun offered a different analysis of the dog sniff issue.

85. 103 S. Ct. at 2651 (Brennan, J., concurring), 2653 (Blackmun, J., concurring). Justice Marshall joined in both concurring opinions. In his dissenting opinion from a denial of certiorari in *Doe v. Renfrow*, 451 U.S. 1022 (1981), Justice Brennan expressed his belief that dog sniffs of people constitute a search. *Id.* at 1025-26 (Brennan, J., dissenting). However, *Doe* involved dog sniffs of people while *Place* involved dog sniffs of luggage. Justice Brennan failed to stress this distinction as he had in *Doe*. *Id.* at 1026 n.4.

86. 103 S. Ct. at 2651 (Brennan, J., concurring), 2653 (Blackmun, J., concurring). Justice Blackmun noted that neither party had an opportunity to brief or express any opinion on the issue of canine sniffs. He stated that in grasping for "the appropriate analysis of the problem," the Court could not consider all the ramifications of such an important issue. *Id.* at 2653 (Blackmun, J., concurring).

In addition, Justice Blackmun stated that the Court should have waited until faced with a case directly presenting the issue on whether a canine sniff constituted a search. *Id.* (Blackmun, J., concurring). He noted that certiorari was currently pending on two such cases. *Id.* (Blackmun, J., concurring).

87. 460 U.S. 276 (1983).

88. *United States v. Place*, 103 S. Ct. at 2651 (Brennan, J., concurring).

89. *United States v. Knotts*, 460 U.S. at 285.

90. *United States v. Place*, 103 S. Ct. at 2651 (Brennan, J., concurring).

91. *Id.* (Brennan, J., concurring).

92. *Id.* (Brennan, J., concurring). Justice Brennan stated that the use of a dog sniff search implicates concerns that are at least as sensitive as those implicated by the use of certain electronic techniques. *Id.* at 2651 (Brennan, J., concurring). This language was derived from *Knotts*, in which Justice Stevens stated that the use of electronic devices "implicate[s] especially sensitive concerns." *United States v. Knotts*, 460 U.S. at 288 (Stevens, J., concurring). In *Knotts* and in *Place*, the concurrences cited *Katz v. United States*, 389 U.S. 347 (1967). The Court in *Katz* held that the presence or absence of a physical intrusion or trespass upon an area is not determinative of a fourth amendment search. *Id.* at 353. Hence, although a dog sniff does not amount to a physical intrusion, it still might violate a protected privacy interest.

He suggested that the sniff may be a minimally intrusive search that could be justified in certain situations upon mere reasonable suspicion.⁹³

These three Supreme Court cases show the Court's tendency to disfavor the application of the exclusionary rule. While the Court expands the government's freedom within such investigative techniques as controlled deliveries, electronic devices, and dog sniffs, it may also be restricting the areas in which a legitimate expectation of privacy exists. The Court extends the police's authority to search and intrude upon an individual's privacy by holding that the police's use of such investigative techniques does not constitute a search within the scope of the fourth amendment.

b. safes

In *United States v. Issacs*,⁹⁴ the Ninth Circuit held that the defendant had a legitimate expectation of privacy in a safe from which his journals were seized by government agents.⁹⁵ Secret Service agents obtained a warrant to search Issacs' apartment for rent receipts and counterfeit Federal Reserve Notes. During their search of the apartment, the agents discovered a gun, a shoulder holster, ammunition, drug paraphernalia, and considerable amounts of methaqualone and cocaine in Issacs' bedroom closet.⁹⁶ Inside the closet, the agents noticed a safe which they opened after receiving the combination from Issacs. The safe contained six journals. One agent flipped through them to see if they contained any receipts or counterfeit notes. While leafing through one journal, the agent saw some notations which appeared to record drug transactions. Although the agent did not notice similar notations in the remaining five journals, he seized all six.⁹⁷

93. 103 S. Ct. at 2652-53 (Blackmun, J., concurring).

94. 708 F.2d 1365 (9th Cir.), *cert. denied*, 104 S. Ct. 165 (1983).

95. *Id.* at 1368.

96. *Id.* at 1366. There was no dispute over whether these items were within plain view. *Id.*

97. *Id.* A grand jury indicted Isaacs on six counts. The first and second counts charged him with passing counterfeit notes in violation of 18 U.S.C. § 472 (1976); the third and fifth counts charged him with possession with intent to distribute methaqualone and cocaine in violation of 21 U.S.C. § 841(a)(1) (1976). The fourth and sixth counts charged him with use of a gun to commit the crimes charged in the third and fifth counts in violation of 18 U.S.C. § 924(c)(1) (1976). At the first trial, which ended in a mistrial, the court admitted the journal read by the agent and excluded the remaining five journals. At the second trial, the court admitted the five journals for purposes of impeachment and admitted evidence of possession of firearms. The jury found Issacs guilty on both counts of possession with intent to distribute. The court also granted the government's request to dismiss the counterfeit note counts. 708 F.2d at 1366.

On appeal from convictions of possession with intent to distribute methaqualone and cocaine,⁹⁸ Issacs argued that the evidence in the one journal was not in plain view because the agents needed to read the contents to discover the incriminating notations.⁹⁹ The government contended that Issacs lacked standing to object to the search because he denied ownership and possession of the journals at trial.¹⁰⁰

The Ninth Circuit held that the search exceeded the scope of the fourth amendment because Issacs had a legitimate expectation of privacy in the safe in which the journals were found.¹⁰¹ The court first acknowledged that a prosecutor may simultaneously claim, without legal contradiction, that a defendant charged with possession of contraband possessed the seized good yet was not subjected to a fourth amendment violation.¹⁰² This rule, however, does not allow a prosecutor to charge possession and dispute expectation of privacy in every case.¹⁰³ The government's argument failed in this case because the facts rendered its positions necessarily inconsistent.¹⁰⁴ The court stated that the government could not rely upon Issacs' denial of ownership to defeat his right to challenge the legality of the search and then introduce the journals as evidence of his guilt.¹⁰⁵ Issacs' denial of ownership should not defeat his expectation of privacy in the safe nor his right to object to the search given that the government will ask the jury to reject that denial as it introduces the journals to prove Issacs' guilt.¹⁰⁶ More-

98. For text of 21 U.S.C. § 841(a)(1) (1976), *see supra* note 69.

99. 708 F.2d at 1366-67.

100. *Id.* at 1367. The government also claimed the journals were within plain view. *Id.*

101. *Id.* at 1368.

102. *Id.* at 1367 (citing *United States v. Salvucci*, 448 U.S. 83, 90 (1980)). In *Salvucci*, the Court overruled the automatic standing rule established in *Jones v. United States*, 362 U.S. 257 (1960). Under the automatic standing rule, a defendant had automatic standing to challenge the constitutionality of a seizure if possession of the items seized was an essential element of the offense charged. *Id.* at 263. The rule was created for two reasons: First, in order to show standing a defendant would need to allege facts at a suppression hearing which might be sufficient to convict him. Second, the rule was to prevent the government gaining the advantage of contradictory positions. *Id.* at 262-63. The Court in *Salvucci* realized that subsequent cases abolished the need for automatic standing. *United States v. Salvucci*, 448 U.S. 83, 88-89 (1980). In *Simmons v. United States*, 390 U.S. 377 (1968), the Court held that a defendant's testimony at a suppression hearing cannot be used as evidence of his guilt at trial. *Id.* at 394. The Court in *Rakas v. Illinois*, 439 U.S. 128 (1978), established that the prosecution can with legal consistency argue that a defendant charged with possession owned the seized item but did not suffer a fourth amendment violation. *Id.* at 141-44. This would be true because possession of an item was no longer dispositive of a privacy interest in the item. *Id.* at 143-44 n.12. *See infra* note 155 and accompanying text.

103. 708 F.2d at 1367.

104. *Id.* at 1367-68.

105. *Id.* at 1368.

106. *Id.* *See United States v. Ross*, 655 F.2d 1159, 1165 (D.C. Cir. 1981) (en banc),

over, the government did not and could not dispute Issacs' expectation of privacy in the safe.¹⁰⁷ Prosecutorial self-contradiction would not have existed, however, if the government had argued that the defendant possessed the seized good, but lacked an expectation of privacy in the area searched.¹⁰⁸ Here, the Court rejected the government's distinction between an expectation of privacy in the invaded area and in the items seized.¹⁰⁹ The government's admission that Issacs had a privacy interest in the safe precluded its claim that he had none in the journals found inside.¹¹⁰ Therefore, the court concluded that Issacs had a legitimate expectation in the safe which conferred standing to challenge the validity of the seizure of the journals.¹¹¹

c. business premises and administrative searches

The fourth amendment protects a businessman's legitimate expectation of privacy in his private commercial property.¹¹²

wherein the court rejected the "Government's position that [defendant's] trial tactic, denying knowledge of the [contraband-filled] bag, strips him of Fourth Amendment protection," *rev'd on other grounds*, 456 U.S. 798 (1982).

107. 708 F.2d at 1368. The court stated that there was no question of abandonment of the items found in Issac's personal safe. *Id.*

108. *Id.* In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the government successfully and properly argued that the defendant owned the drugs which he placed inside his friend's purse, in which he lacked an expectation of privacy. *Id.* at 104-06. In *Salvucci*, the government argued that the defendant owned stolen checks found inside another person's apartment, in which he had no expectation of privacy. *United States v. Salvucci*, 448 U.S. 85, 95 (1980). The government may argue that a defendant who once possessed an item but subsequently abandoned it, also abandoned any expectation of privacy in the item. *United States v. Veatch*, 674 F.2d 1217, 1220-22 (9th Cir. 1981) (defendant's denial of ownership of a wallet constituted abandonment of property, leaving him without a legitimate expectation of privacy and unable to challenge the search). The First Circuit has held that the government may seek to introduce evidence seized from a room in which the defendant had no privacy interest beyond mere presence in the room. *United States v. Irizarry*, 673 F.2d 554, 556 (1st Cir. 1982).

Except for the abandonment cases, these cases reveal that a defendant who owns a seized good but lacks an expectation of privacy in the "area searched," may not successfully challenge the search on fourth amendment grounds. *Salvucci*, 448 U.S. at 93. A defendant's ownership of a seized item will not automatically confer standing. The Supreme Court in *Rakas* and in *Rawlings* emphasized that ownership of seized items is merely one factor to be considered in determining whether a person's fourth amendment rights have been violated. *Rakas*, 439 U.S. at 143-44 n.12; *Rawlings*, 448 U.S. at 105.

109. 708 F.2d at 1368. The cases on which the government relied involved seizures of items from places outside of defendant's control. *See United States v. Salvucci*, 448 U.S. 83, 85-86 (1980); *Rawlings v. Kentucky*, 448 U.S. 98, 100-02 (1980). In *Issacs*, the safe was arguably within Issacs' control because he possessed its combination and gave it to the agents.

110. 708 F.2d at 1368.

111. *Id.*

112. *See v. City of Seattle*, 387 U.S. 541, 543 (1967) (inspection of a warehouse for possi-

In *United States v. Nadler*,¹¹³ the Ninth Circuit held that defendants did not have a reasonable expectation of privacy in a print shop.¹¹⁴ Executing a search warrant, Secret Service agents raided Victory Printing, which was owned by two of the Nadlers' co-defendants. When the agents entered the premises, the Nadlers were not present, but the co-defendants were engaged in counterfeiting. The agents seized offset printing and photographic equipment, counterfeit plates and negatives, and approximately \$600,000 in counterfeit currency.¹¹⁵ At trial, co-defendant Munt testified as to the present and previous counterfeiting operations with defendants Dorian and Roni Nadler.

On appeal from convictions for conspiracy to print, possess and transfer counterfeit money,¹¹⁶ the Nadlers argued that Munt's testimony should be excluded as the "tainted fruit" of an illegal search.¹¹⁷ The court did not address this issue, however, because the Nadlers had failed to carry their burden of proving that they had a legitimate expect-

ble violation of municipal fire code required warrant). The Supreme Court in *See* stated that the "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.*

113. 698 F.2d 995 (9th Cir. 1983).

114. *Id.* at 999-1000. The Nadlers were appealing the denial of their motion to suppress co-defendant Munt's testimony which implicated them in the present counterfeiting crimes. *Id.* at 1000.

The court equated the defendants' lack of an expectation of privacy with their lack of standing. *Id.* The court did not emphasize the fact that the search occurred on commercial premises, nor did it find that the Nadlers' expectation of privacy was any less on commercial premises than it would have been on residential premises.

115. *Id.* at 997. The agents had a search warrant but the district court had established that the affidavits in support of the warrant did not meet the requirements of *Aguilar v. Texas*, 378 U.S. 108 (1964). 698 F.2d at 997. Accordingly, none of the physical evidence seized was offered as evidence against the Nadlers.

116. The Nadlers were convicted of violating 18 U.S.C. §§ 371, 471, 474 (1976).

18 U.S.C. § 371 (1976) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000, or imprisoned not more than five years, or both

18 U.S.C. § 471 (1976) provides:

Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

18 U.S.C. § 474 (1976) provides in pertinent part:

Whoever has in his control, custody, or possession any plate, stone, or other thing . . . with intent to use such plate, stone or other thing . . . in forging or counterfeiting . . . [s]hall be fined not more than \$5,000 or imprisoned not more than fifteen years

117. 698 F.2d at 997.

tation of privacy in Victory Printing and therefore had no standing to object to the search.¹¹⁸

The Ninth Circuit held that the Nadlers' subjective expectation of privacy in the premises was not objectively reasonable.¹¹⁹ The court noted that the defendants did not have any ownership or possessory interest in the Victory Printing business or in the building itself.¹²⁰ Moreover, the Nadlers did not have any right, license or privilege to exclude any person from entering the shop.¹²¹ Although the defendants argued that they exercised control over the shop because the entrance door was locked and there was a "closed" sign outside the shop, the court stated that Victory Printing was a public business and had a large glass window which allowed the agents to see into the room where people were in the process of counterfeiting.¹²² Hence, anyone passing by could enter the shop during business hours, or see into the shop at any time through the glass window.¹²³ Because there was no evidence to support the Nadlers' claim of an expectation of privacy, the judgment of the district court was affirmed.

Administrative searches of businesses that have been pervasively or traditionally regulated are an exception to the warrant require-

118. *Id.* at 998. The issue of whether the Nadlers had a legitimate expectation of privacy was not raised by any party in the district court. *Id.* The Ninth Circuit raised the issue sua sponte.

119. 698 F.2d at 999-1000. The court applied the two-prong test from *Katz v. United States*, 389 U.S. 347 (1967); see *supra* note 3 and accompanying text.

120. 698 F.2d at 999. The court recognized that although the defendants' possessory interest in the premises searched or items seized is relevant, it is not dispositive of their legitimate expectation of privacy in the print shop. *Id.*

The court followed and reemphasized the holding in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), that "arcane" concepts of property law [do not] control the ability to claim the protections of the Fourth Amendment." *Id.* at 105. In *Rawlings*, the Court held that the defendant did not have an expectation of privacy in a friend's purse even though he owned the drugs the police found inside the purse.

Although the court reemphasizes this principle from *Rawlings*, its holding stresses the fact that the defendants did not have a possessory interest in the premises searched. The court twice noted that the items that the Nadlers owned were suppressed. 698 F.2d at 998-99.

121. 698 F.2d at 999.

122. *Id.*

123. *Id.* Although the court did not discuss the plain view doctrine, its holding suggests that the defendants' activity and the interior of the shop were within the officers' plain view. Hence, the defendants lacked an expectation of privacy in items, activity, and premises within the plain view of the public and the officers.

The district court and the Ninth Circuit did, however, suppress the printing press and plate-maker in which the defendants had a possessory interest. The Ninth Circuit assumed that the Nadlers had "standing" as to the printing press and plate-maker purchased by Dorian Nadler and Munt. *Id.* at 998.

ment.¹²⁴ In these circumstances, the person operating the business is aware of and expects government supervision and regulation and thus cannot have a reasonable expectation of privacy.¹²⁵ The Ninth Circuit recently decided a case which addressed this exception.

In *United States v. Kaiyo Maru No. 53*,¹²⁶ the Ninth Circuit held that a warrantless search authorized by the Fishery Conservation and Management Act (FCMA) did not violate the fourth amendment.¹²⁷ The Coast Guard sighted the Kaiyo Maru fishing, by permit, in the

124. *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless inspection of weapon dealer's premises upheld because his business was heavily regulated by the government); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (warrantless inspection of alcoholic beverage industry held constitutional because the industry is subject to close government inspection). The pervasively regulated industry exception established in *Colonnade* and *Biswell* was most recently applied in *Donovan v. Dewey*, 452 U.S. 594 (1981) (warrantless search of an underground surface mine held constitutional due to strong federal interest in improving safety conditions in mines, and further, mines have been pervasively regulated, and the pertinent statute provided a sufficient substitute for a warrant). The exception provides that "warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment." *Donovan*, 452 U.S. at 598.

125. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981) (warrant may not be required where Congress has "reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections"). The Supreme Court also recognized and reaffirmed this exception to the warrant requirement in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). In *Marshall*, however, the Court did not apply the pervasively regulated industry exception because the pertinent OSHA statute was not a sufficient substitute for a warrant. The statute was not limited with respect to the number of businesses it applied to nor were the number or frequency of searches limited. *Id.* at 323.

The cases which involve administrative searches suggest that an individual's expectation of privacy on commercial premises is not as strong as one's privacy interest in a private residence. The *Donovan* Court stated that "[t]he greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys . . . differs significantly from the sanctity accorded an individual's home." 452 U.S. at 598-99.

126. 699 F.2d 989 (9th Cir. 1983).

127. *Id.* at 995. The FCMA provides in pertinent part:

(b) (1) Any officer who is authorized (by the Secretary, the Secretary of the Department in which the Coast Guard is operating, or the head of any Federal or State agency which has entered into an agreement with such Secretaries under subsection (a) of this section) to enforce the provisions of this chapter may— (A) with or without a warrant or other process—

. . . .
(ii) board, and search or inspect, any fishing vessel which is subject to the provisions of this chapter; (iii) seize any fishing vessel . . . used or employed in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this chapter; (iv) seize any fish . . . taken or retained in violation of any provision of this chapter, and (v) seize any other evidence related to any violation of any provision of this chapter

16 U.S.C. § 1861(b) (1982).

Fishery Conservation Zone (FCZ) off Alaska.¹²⁸ Coast Guard officers decided to make a routine boarding to inspect the Kaiyo Maru's documents and catch.¹²⁹ Without a warrant or probable cause, the officers boarded and searched the ship. On board, the officers discovered serious violations of the FCMA.¹³⁰

The court held that the warrantless search did not violate the crew's fourth amendment rights.¹³¹ The court noted that fishing is a highly regulated enterprise and that the inspections were not infrequent. Therefore, the vessel owner expected that his property would be periodically inspected.¹³² The court noted, however, that the inspections were limited to areas of the boat which were necessary to enforce the FCMA.¹³³ The crew's living quarters and personal property were excluded from the search because there was a greater expectation of privacy in these areas.¹³⁴ In further support of its position, the court stressed both the federal interest in protecting natural resources in the FCZ, and that the statute authorized such searches.¹³⁵

128. The FCZ is a 197 mile wide band of ocean beyond the territorial waters of the states which is governed by the FCMA regulations. 699 F.2d at 992.

129. The Coast Guard requested information regarding the Kaiyo from its Juneau offices. The Coast Guard officers were misinformed that the Kaiyo had failed to communicate to the Coast Guard that it had switched fishing areas, as required by 50 C.F.R. § 611.4(a)(4) (1979). 699 F.2d at 992.

130. The violations of the FCMA included underreporting of the catch and catching hali-but, a prohibited species to all foreign fishermen. *Id.*

131. *Id.* at 995, 997.

132. *Id.* at 997.

133. *Id.* at 997 n.23. This limitation of the search is consistent with *United States v. Raub*, 637 F.2d 1205 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980). In *Raub*, the court stated that the search was restricted to the areas of the ship which must be inspected to enforce the fishing regulations. *Id.* at 1210. The court indicated that this restriction of the search in turn restricted the possibility of abuse by officers. *Id.* The limited possibility of abuse was just one factor in favor of upholding a warrantless search of a salmon fishing vessel in *Raub*. *Id.*

134. The court relied upon *United States v. Tsadu Maru*, 470 F. Supp. 1223 (D. Ala. 1979) (warrantless search under FCMA of Japanese vessel in the Fishery Conservation Zone fell within the pervasively regulated industry exception). 699 F.2d at 997 n.23. In *Tsadu Maru*, the court excluded the crew's living quarters and personal property from the search because of the greater expectations of privacy in these areas. *Tsadu*, 470 F. Supp. at 1229.

135. 699 F.2d at 995-96. The Supreme Court in *Donovan* stated that Congress may determine when a warrantless search is necessary to further a regulatory scheme in areas where legitimate federal government interests exist. *Donovan v. Dewey*, 452 U.S. 594, 599-600 (1981).

The court in *Kaiyo Maru* also indicated that the statute and the enforcement policy of the Coast Guard sufficiently limited the discretion of the inspecting officers in the field to render the warrantless searches "reasonable" under the fourth amendment. 699 F.2d at 996.

d. vehicle searches

The courts have established that a person enjoys a lesser expectation of privacy in a car than in a home.¹³⁶ Hence, warrantless searches of automobiles do not necessarily violate the fourth amendment. The reason behind this rule is that a car travels public roads, where its contents and occupants are within plain view.¹³⁷ The fact that a car is involved in the search does not necessarily mean that the person has waived fourth amendment rights or expectations of privacy.¹³⁸ The following Ninth Circuit cases address the issue of when a defendant maintains a sufficient and recognizable privacy interest in a vehicle.

In *United States v. Perez*,¹³⁹ the Ninth Circuit reversed the district court's finding that defendants had no expectation of privacy in the gas tank of a truck they had hired.¹⁴⁰ Perez and De La Garza were suspected of smuggling drugs into the United States from Mexico. A four-some, consisting of Perez, De La Garza, Sanchez, and Marquez, drove north from the border while customs officers kept them under continuous air and ground surveillance. Perez rode in the truck with Sanchez, while the other defendants followed them in a car. When the men stopped to eat, the officers approached them with weapons drawn. Sanchez, the driver and owner, consented to a search of the truck. A narcotics detecting dog sniffed at the gas tank. Searching the tank, the

136. *United States v. Chadwick*, 433 U.S. 1, 12 (1977) (recognizing diminished expectations of privacy in automobiles as compared to other property interests); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); see *infra* text accompanying note 137. The factors which reduce one's privacy interest in an automobile are essentially twofold: first, the inherent mobility of a car makes it impractical to obtain a warrant; and second, the use and regulation of an automobile reduces the reasonable expectation of privacy that exists with other property interests. See *Arkansas v. Sanders*, 442 U.S. 753, 761 (1979) (Court refused to extend automobile exception to warrantless search of personal luggage even though it was located in an automobile lawfully stopped by the police).

137. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).

138. *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971) ("The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears.").

139. 689 F.2d 1336 (9th Cir. 1982) (per curiam). This was the second appeal in this case. In its prior decision, the Ninth Circuit held that the case did not fit within the extended border searches or consent exceptions to the warrant requirement. The court remanded the case to determine whether the defendants had a reasonable expectation of privacy in the gas tank of their truck. *United States v. Perez*, 644 F.2d 1299 (9th Cir. 1981).

On remand, the district court held that Sanchez, as owner and driver of the truck, would have a legitimate expectation of privacy in the truck. Sanchez, however, died before trial. 689 F.2d at 1337. The district court also held that all the defendants lacked an expectation of privacy in the truck because they had merely rented it and did not drive it. *Id.*

140. *Id.* at 1338-39. The defendants hired the truck's owner, Sanchez, to transport the drugs across the border. *Id.* at 1337.

officers found four pounds of heroin.¹⁴¹

On appeal from convictions for drug offenses, Perez argued that his arrangements to hire the truck, his placement of heroin inside the truck, and his role as escort demonstrated a propriety interest in the contents of the truck, as well as a reasonable expectation of privacy.¹⁴² The government contended that appellants lacked a reasonable expectation of privacy, and failed to show their right to exclude others from the truck.¹⁴³

The Ninth Circuit disagreed with the government, holding that the defendants had an expectation of privacy in the gas tank, which was violated by the warrantless search.¹⁴⁴ The defendants' close surveillance of the truck, their arrangement with and payment to Sanchez to transport the heroin, and their joint control over the truck showed that they did not want any interference with their plan to transport and deliver the drugs.¹⁴⁵ The court also reasoned that a closed compartment created a greater expectation of privacy than areas or objects that are exposed.¹⁴⁶

In response to the government's claim that defendants did not have a right to exclude others from the truck, the court emphasized that the right to exclude others is only one factor in the fourth amendment analysis.¹⁴⁷ Moreover, a person can have a legitimate expectation of privacy in a place or object he does not own.¹⁴⁸ Hence, the officers' search violated the defendants' reasonable expectation of privacy.

In *United States v. One 1977 Mercedes Benz*,¹⁴⁹ the Ninth Circuit held that the claimant did not have a reasonable expectation of privacy

141. *Id.*

142. *Id.*

143. *Id.* at 1337-38.

144. *Id.* at 1338-39.

145. *Id.* at 1338.

146. *Id.* The court distinguished *United States v. Freie*, 545 F.2d 1217 (9th Cir. 1976) (per curiam), *cert. denied*, 430 U.S. 966 (1977) and *United States v. Pruitt*, 464 F.2d 494 (9th Cir. 1972). Both cases involved containers in open areas, which anyone might discover, which suggests a lesser expectation of privacy than in a gas tank of a private car. 689 F.2d at 1338.

147. 689 F.2d at 1338.

148. *Id.* (citing *United States v. Reyes*, 595 F.2d 275, 278 (5th Cir. 1979)). In *Reyes*, however, the defendants failed to establish that their own constitutional rights were violated or that they had a legitimate expectation of privacy in a place. They did not assert an ownership interest in the items seized from the plane, but merely claimed to be passengers transported to the United States. In addition, the court stated that one's expectation of privacy is less in a plane than in a home. *United States v. Reyes*, 595 F.2d 275, 279 (5th Cir. 1979).

149. 708 F.2d 444 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 981 (1984).

in her car during the time she lent it to a third party.¹⁵⁰ Officers stopped the Mercedes when they saw that it lacked license plates. Upon request, Reese, who was driving the car at the time, produced his driver's license but could not find the vehicle registration. When Reese got out of the car, one of the officers observed a package lying on the passenger seat, which they believed contained narcotics.¹⁵¹ It was later determined that the package contained cocaine. Webb, the owner of the car, arrived at the scene and told the officers that Reese had her permission to use the car but that she knew nothing about narcotics being in the car. The police seized the car the following day pursuant to a warrant.¹⁵²

The Ninth Circuit held that Webb could not challenge the legality of the search of her car because she had relinquished her expectation of privacy when she lent the car to Reese.¹⁵³ The court first reemphasized the principle that one has a lesser expectation of privacy in a car than in other areas.¹⁵⁴ Hence, Webb began with a reduced expectation of privacy. Although ownership is one factor which courts consider in determining whether a legitimate expectation of privacy exists in an object or place, it is not determinative.¹⁵⁵ Here, Webb did not take any precautions to exclude others from her car, which is one means of increasing one's legitimate expectation of privacy.¹⁵⁶ Further, the package, which was arguably in plain view, was seized from the passenger

150. *Id.* at 449. The court noted that the question in the case was not whether Webb, the owner of the car, had standing to challenge the legality of the search of her car, but whether the alleged illegal search violated any of Webb's fourth amendment rights. The court stated that the question of standing was subsumed within the substantive fourth amendment claim; for example, does the party have an expectation of privacy in the area searched. *Id.* at 448 n.3.

151. The officer claimed that the package was in "plain sight." There was a dispute, however, as to whether the contents of the package were visible to the officers. *Id.* at 446.

152. For a discussion of the legality of the seizure and the forfeiture action, see Part I, § D. *Warrantless Arrests* this survey.

153. 708 F.2d at 449-50. The question of whether an owner of a vehicle can object to a search that was conducted while the vehicle was in the possession of a third party was one of first impression in the Ninth Circuit. *Id.* at 448.

154. *Id.* The court noted that because of the extensive regulation of cars, drivers, and traffic, cars often come into contact with the police. Therefore, police can often make intrusions without invading individual privacy interests in cars. *Id.*

155. *Id.* at 449. See *Rakas v. Illinois*, 439 U.S. 128, 149-50 (1978) (" 'arcane' concepts of property law ought not to control the ability to claim the protections of the Fourth Amendment"). In *Rakas*, the Court noted that the right to exclude others may create an expectation of privacy and this right may or may not arise from a property interest. *Id.* at 143-44 n.12. See *Accord Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980).

156. 708 F.2d at 449. See *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982), in which the court stated that the right to exclude others is but one factor in the fourth amendment analysis.

side where Reese could have invited any stranger.¹⁵⁷ Therefore, by voluntarily lending possession of the car to Reese for his exclusive use, Webb extinguished her already diminished expectation of privacy in her car.¹⁵⁸

These cases stress that a defendant does not automatically lose his privacy interest because a vehicle is involved in a police search. A party may lack an expectation of privacy by loaning a car to a third party,¹⁵⁹ but retain a privacy interest by hiring a third party to transport items.¹⁶⁰ Therefore, it is important to examine the facts of the case to determine whether the party challenging the search took precautions to maintain a legitimate expectation of privacy in the vehicle.

e. abandoned property

A warrantless search or seizure of property which has been voluntarily abandoned does not offend any fourth amendment rights.¹⁶¹ The test for "abandonment" is whether the person reasonably intends to retain an expectation of privacy in the items claimed to be abandoned.¹⁶² The courts use an objective test,¹⁶³ examining the party's "words, acts, and other objective facts."¹⁶⁴

In *United States v. Burnette*,¹⁶⁵ the Ninth Circuit reversed the district court's findings that the defendant had abandoned her privacy in-

157. 708 F.2d at 449.

158. *Id.* The First and Fifth Circuits have held that when a vehicle owner lends his car to a third party, any expectation of privacy is relinquished while it is in the third party's possession. Hence, the vehicle owner cannot challenge the legality of a search conducted while the car was lent to another person. See *United States v. Dall*, 608 F.2d 910 (1st Cir. 1979) (vehicle owner who lent truck to friends relinquished his expectation of privacy in a locked camper on top of truck because he disclaimed knowledge of its contents), *cert. denied*, 445 U.S. 918 (1980); *United States v. Dyar*, 574 F.2d 1385 (5th Cir. 1978) (defendants who had leasehold interest in plane relinquished their privacy interest by giving possession temporarily to pilot), *cert. denied*, 439 U.S. 982 (1978).

159. See *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983).

160. *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982).

161. *Abel v. United States*, 362 U.S. 217, 241 (1960) (Court held that defendant had abandoned items found in trash cans of hotel rooms he had just vacated).

162. *United States v. Diggs*, 649 F.2d 731, 735 (9th Cir. 1981) (defendant abandoned motel room because he owed back rent; motel terminated his tenancy when it received key to room in mail, and defendant never tried to retrieve items from room).

163. *United States v. Kendall*, 655 F.2d 199, 201 (9th Cir. 1981) (defendant had abandoned suitcase in which he was transporting cocaine when he denied ownership of bag and had non-matching claims check), *cert. denied*, 455 U.S. 941 (1982).

164. The Ninth Circuit established these criteria in *United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976) (defendant who dropped suitcase and walked away when police approached did not show intent to abandon property).

165. 698 F.2d 1038 (9th Cir. 1983).

terest in her purse.¹⁶⁶ On appeal from a conviction for aiding and abetting armed robbery,¹⁶⁷ Burnette argued that she had a reasonable expectation of privacy in her purse which was violated by a search conducted by the police.¹⁶⁸

The police spotted the defendant next to her car which fit the description of a get-away car used in a bank robbery. The defendant was attempting to leave the area when officers stopped her. As an officer approached her, she spontaneously told him that she had just found the purse she was holding. When asked for identification, the defendant took a traffic court summons from the purse she had supposedly just found. The police then asked for photo identification and she responded that it was in her wallet in her purse. Afraid that the defendant might run, the officer ordered her to sit on the curb and placed her under arrest. While the defendant was looking in her purse, the officer noticed that it was full of money.¹⁶⁹ He seized the purse, put her in handcuffs, and gave the purse to another officer. At the police station, the police continued their search of the purse and found \$5,048 in cash, as well as bait bills belonging to the bank that had been robbed.

Reversing the district court, the Ninth Circuit held that the defendant's conduct proved that she had tried to and did retain a reasonable expectation of privacy in the purse.¹⁷⁰ Although she initially denied ownership, her behavior during the encounter with the officers demonstrated a lack of abandonment.¹⁷¹ The court based its decision upon the following behavior: the defendant called the purse "my purse"; she turned away from the officer to conceal the contents of the purse when searching for her wallet; she did not open the purse completely but rather stuck her hand into it to get the wallet; and she did not relinquish possession of the purse but held on to it until the officer removed it from her.¹⁷² Although the court found the defendant had

166. The court applied the clearly erroneous standard of review in reaching its decision. *Id.* at 1048.

167. 18 U.S.C. § 2 (1976) provides: "Whoever commits an offense against the United States or aids, abets . . . or procures its commission, is punishable as a principal."

168. 698 F.2d at 1046-47.

169. *Id.* at 1043. Burnette's furtive conduct aroused the officer's suspicion, so he moved around her to see what she was doing. *Id.* at 1043-44.

170. *Id.* at 1048.

171. *Id.*

172. *Id.* The court stressed the importance of retaining physical possession of the purse. It noted that the previous cases in which courts have found abandonment usually involved denial of ownership and physical relinquishment of property. *Id.* at 1048 n.19. See *supra* notes 163 & 164 for a discussion of *United States v. Kendall*, 655 F.2d 199 (9th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982) and *United States v. Jackson*, 544 F.2d 407 (9th Cir. 1976).

not abandoned her purse, it admitted the evidence because the purse was seized and searched incident to a lawful arrest.¹⁷³

2. State action

The actions of a private party who conducts an unreasonable search or seizure do not implicate fourth amendment rights.¹⁷⁴ If the private party acted on behalf of the police, or if the police requested, suggested or ordered the person to act, however, then fourth amendment issues are implicated.¹⁷⁵

The Ninth Circuit has established two factors to determine whether a person has acted as an "instrument" or agent¹⁷⁶ of the government: (1) whether the government knew of and acquiesced in the search, and (2) whether the party intended to aid the government or to further his own ends.¹⁷⁷

In *United States v. Miller*,¹⁷⁸ the Ninth Circuit held that a private

173. 698 F.2d at 1048-50. The court held that once an item has been lawfully seized and searched, a subsequent warrantless search of that item is permitted as long as the item remains in the uninterrupted possession of the police. Therefore, the warrantless search at the police station was valid and did not violate Burnette's expectation of privacy. The court limited its holding to initial searches that were legal and did not address the situation where an item is returned to the owner. *Id.* at 1049 n.3.

The court suggested that if the police had not searched the bag immediately after the arrest, Burnette would have retained her privacy interest in the purse. *Id.* at 1050. The police would then have needed a warrant to conduct a subsequent search at the station. *Id.* at 1049-50.

The court distinguished *United States v. Monclavo-Cruz*, 662 F.2d 1285 (9th Cir. 1981). In *Monclavo-Cruz*, the defendant's purse was not searched at the time of arrest; hence, she retained her privacy interest in the purse. As a result, the subsequent warrantless search at the police station in *Monclavo-Cruz* violated the defendant's expectation of privacy. 698 F.2d at 1050.

174. *Walter v. United States*, 447 U.S. 649, 656 (1980). In *Walter*, the FBI's warrantless screening of obscene films violated the defendant's expectation of privacy despite the fact that a private party had previously opened the package containing the films after receiving them mistakenly in the mail. The Court held that the private party was not acting on behalf of the FBI when it opened a package containing obscene films and that the government significantly expanded the search that had been conducted by the private party and required a warrant.

175. *Coolidge v. New Hampshire*, 403 U.S. 443, 487-88 (1971) (wife of defendant was not acting as government agent when she offered to give police her husband's clothes and guns, because her motive was to clear her husband and the police did not coerce or force her to give them the items); *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (airplane employee was acting as government agent when he searched package because DEA agents encouraged and paid for previous searches and he expected pay for his service).

176. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Supreme Court established that the test to determine if there has been state action is whether the party "acted as an 'instrument' or agent of the state." *Id.* at 487.

177. *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981).

178. 688 F.2d 652 (9th Cir. 1982).

party's contacts with government officers were not sufficient to constitute state action.¹⁷⁹ Szombathy had received a tip that his stolen trailer was in Superior, Montana. The police invited him to Superior to examine certain trailers on defendant Miller's property that may have belonged to Szombathy.¹⁸⁰ Upon arriving in Superior, Szombathy met with the officers and proposed that he go to Miller's posing as a prospective buyer of mining equipment so that he could closely observe the trailers. The officers did not object and agreed to meet Szombathy later. When he arrived at Miller's property, Szombathy met Miller's son who invited him into the shop area. In this area, Szombathy recognized his trailer, and later saw conveyor belts that had been stolen with the trailer. After reporting his findings to the police, Szombathy, accompanied by an agent, returned to Miller's property to take photographs of his stolen equipment.¹⁸¹ By the time the officers obtained a search warrant, the equipment was no longer at Miller's, but was later discovered on a third party's property.

On appeal from convictions for knowingly receiving and concealing a stolen trailer in violation of 18 U.S.C. section 2315,¹⁸² Miller argued that Szombathy was acting as a government agent when he entered and inspected Miller's property.¹⁸³ He based his argument on such private citizen-police contacts as the invitation to come to Superior, the approval of Szombathy's plan to pose as a potential buyer to gain access to Miller's property, and the agent's accompaniment of Szombathy on his return visit to Miller's property.¹⁸⁴

The Ninth Circuit upheld the district court's decision that Szombathy had acted in a private capacity and that Miller's fourth amendment rights were therefore not violated.¹⁸⁵ To reach its conclusion, the court analyzed the three interactions which Miller claimed to have constituted state action. First, the police invited Szombathy to

179. *Id.* at 656.

180. The trailers were in public view, parked between the frontage road that led to Miller's property and the highway. They were approximately 100-150 yards from the highway. *Id.* at 655.

181. *Id.* at 656. The agent followed Szombathy for protective purposes and did not enter Miller's property. *Id.*

182. 18 U.S.C. § 2315 (1976) provides in pertinent part: "Whoever receives, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, . . . of the value of \$5,000 or more . . . knowing the same to have been stolen, unlawfully converted, or taken . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

183. 688 F.2d at 656.

184. *Id.*

185. *Id.* at 657.

Superior so that he could identify his stolen items.¹⁸⁶ The court found that the invitation did not allow the police to indirectly intrude upon Miller's property or privacy interests through Szombathy. Second, Szombathy, and not the police, suggested the idea of posing as a prospective buyer.¹⁸⁷ Also, the officers did not encourage, force, or request Szombathy to conduct a search on their behalf.¹⁸⁸ Finally, the agent who followed Szombathy when he returned to Miller's property did so for safety reasons only.¹⁸⁹ The officer stayed off the property and watched Szombathy through binoculars.¹⁹⁰ The court stated that the officer's attempt to stay hidden cancelled any trace of "police aura around Szombathy."¹⁹¹ Moreover, the officers showed a desire to avoid offending Miller's fourth amendment rights.¹⁹² Therefore, the court concluded that Szombathy acted as a private individual rather than as a government agent. Considering the government's knowledge and approval of Szombathy's search, the court seemed to have based its decision on Szombathy's intent, which was "to recover his stolen property," and not to aid the government.¹⁹³

3. Standing

Fourth amendment rights are personal, and therefore must be asserted by the person whose constitutional rights and interests were vio-

186. *Id.*

187. *Id.* The court stated that police are allowed to ask theft victims to identify certain items which were stolen from them. Because the trailers were parked on the highway, within public view, the police and Szombathy did not intrude upon Miller's privacy interests with their methods of investigation. *Id.* at 658.

188. *Id.* at 657. The court emphasized the fact that Szombathy's proposed actions were not illegal and hence the officers had no reason to discourage him from visiting Miller's property. *Id.*

189. *Id.* at 658.

190. *Id.* See *infra* note 191.

191. *Id.* The court made a minor distinction between the agent remaining off the property and entering the property. If he had accompanied Szombathy onto the property, then he might have cast a "police aura" around Szombathy. *Id.* The agent, however, could still see Szombathy's activities on the property with binoculars and, in effect, he was searching the property through his use of binoculars.

192. *Id.* By remaining off the property, the agents showed their concern about offending Miller's fourth amendment rights. *Id.*

193. *Id.* The court went on to hold that, even if he had acted as a government agent, Szombathy's warrantless search did not violate Miller's expectation of privacy. Szombathy had entered the property with the consent of Miller's son, and the trailers he observed were all within his plain view. The court stated that Miller could not claim an expectation of privacy in items within the plain view of one who was invited onto his property. The court stated that Miller assumed the risk that someone could be invited onto his property by his son and would then observe the stolen trailers. *Id.* at 658-59.

lated by the search or seizure.¹⁹⁴

In *United States v. Chase*,¹⁹⁵ the Ninth Circuit held that the defendant did not have standing to challenge the legality of a warrantless detention of a third party.¹⁹⁶ Eisenberg, who was arrested for drug offenses, having decided to cooperate with Narcotics Task Force (NTF) agents arranged for a cocaine purchase from Chase. After observing Eisenberg enter and leave Chase's house, one agent left to obtain a search warrant. A half hour later, the other agents saw a woman leave Chase's house and drive away. She was stopped on the false pretext of a stolen auto investigation.¹⁹⁷ The woman, Houston, was detained for fifteen to thirty minutes. During the detention, Houston's attorney arrived and was reassured that everything was all right. Afraid that someone at Chase's house would learn of Houston's detention, the police radioed the agents stationed at Chase's residence. The officers then entered and secured Chase's house until the NTF agent returned with a search warrant. Inside the house, the agents found 1,120 grams of cocaine and a .38 caliber gun.¹⁹⁸

Chase moved to suppress the evidence obtained from the search of his house, arguing that the officers' detention of Houston created the exigent circumstances which justified their entry into his home.¹⁹⁹

The court held that Chase did not have standing to challenge the legality of Houston's detention because his fourth amendment rights were not violated.²⁰⁰ The court reasoned that Chase could not claim

194. *Rakas v. Illinois*, 439 U.S. 128 (1978), see *supra* note 1; *Alderman v. United States*, 394 U.S. 165, 175-76 (1969) (Supreme Court held that evidence obtained from illegal electronic surveillance of a co-defendant's or co-conspirator's phone conversation would be admissible against defendant since his own constitutional rights were not violated by the surveillance).

Whereas courts in the past separated the issues of standing and expectation of privacy, now, after *Rakas*, the courts equate standing with an expectation of privacy. A defendant has standing to invoke the exclusionary rule if his expectation of privacy has been violated. See *United States v. Salvucci*, 448 U.S. 83, 93 (1980), *supra* note 2; *Rakas*, 439 U.S. at 138-48.

195. 692 F.2d 69 (9th Cir. 1982).

196. *Id.* at 70.

197. The deputies knew that they had stopped Houston on a false pretext. *Id.* They searched Houston's car and found no incriminating evidence. *Id.*

198. *Id.* Chase was convicted for violation of 21 U.S.C. § 841(a)(1) (1976). See *supra* note 69 for the statutory language. Chase was also convicted of illegal use of a firearm in violation of 18 U.S.C. § 924(c)(2) (1976), which provides in part: "Whoever . . . (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted . . . shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment not less than one year nor more than ten years."

199. 692 F.2d at 70.

200. *Id.*

that the search of his house was illegal without vicariously asserting Houston's constitutional rights.²⁰¹ The court applied, by analogy, the rule that a defendant cannot challenge the legality of a search warrant because the information establishing probable cause was a result of an illegal search or seizure of a third person.²⁰² Thus, Chase could not challenge the legality of the search on the ground that the evidence establishing exigent circumstances was obtained as a result of an illegal detention of Houston.²⁰³

In *United States v. Gallop*,²⁰⁴ the Ninth Circuit remanded the case to determine whether the defendant had an expectation of privacy in his friend's purse in which incriminating evidence had been found.²⁰⁵ While conducting a valid inventory search of his friend Connors' purse, police found syringes, pills, and prescription bottles with Gallop's name on them. The officers arrested Gallop and Connors and continued to search the purse. Inside Connors' purse and Gallop's wallet, they found money orders that had been stolen from the mail.²⁰⁶

In remanding the case, the Ninth Circuit stated that the search of

201. *Id.*

202. *Id.* (citing *United States v. Shovea*, 580 F.2d 1382, 1385-87 (10th Cir.) (defendant could not challenge the legality of an X-ray search conducted on a suitcase belonging to co-defendant), *cert. denied*, 439 U.S. 986 (1978)).

In *Chase and Shovea*, the defendants objected to evidence obtained as a result of a search or seizure "directed at someone else." 692 F.2d at 70 (citing *Jones v. United States*, 362 U.S. 257, 261 (1960) (although defendant was arrested in his absent friend's apartment, where narcotics were found, the Court held that he had a legitimate expectation of privacy in the apartment because he had the owner's permission to stay there, he had a key to the apartment, and his suit and shirt were there)).

203. 692 F.2d at 70. The court went on to hold that the district court's finding of exigent circumstances was not "clearly erroneous." *Id.* at 71. In this situation, the agents had reason to believe that Chase would be "alerted to their presence." *Id.*

204. 694 F.2d 205 (9th Cir. 1982).

205. *Id.* at 207. The case demonstrates the interrelationship between standing and expectation of privacy. The defendant was said to have standing only if he had a privacy interest in his friend's purse. The case can be analyzed under either topic. Although the court did not state its decision in terms of standing nor state that the defendant cannot vicariously assert the rights of Connors, this is what the court was suggesting.

206. The police believed that the defendant and his friend were intoxicated and detained them until they were taken to a "detoxification facility." See *United States v. Gallop*, 606 F.2d 836, 838 (9th Cir. 1979). The inventory search was conducted at this facility.

Gallop was convicted of possessing money orders stolen from the mail in violation of 18 U.S.C. § 1708 (1976), which provides in pertinent part:

Whoever steals, takes, . . . or by fraud or deception obtains, or attempts so to obtain, from out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route, or other authorized depository . . . any letter, postal card, package, bag, or mail . . . or removes from any such . . . mail, any article or thing contained therein . . . [s]hall be fined not more than \$2,000 or imprisoned not more than five years, or both.

Gallop's wallet incident to the arrest was legal unless he had an expectation of privacy in the purse.²⁰⁷ As in *Rawlings v. Kentucky*,²⁰⁸ the police in *Gallop* arrested the defendant based on the evidence found in a friend's purse. Following *Rawlings*, the court stated that the defendant's fourth amendment rights were violated only if he had an expectation of privacy in Connors' purse.²⁰⁹

Both *Chase* and *Gallop* reemphasized the principle that a defendant must have a personal privacy interest in the item or area searched or seized in order to have standing to challenge the government's action.

4. Applicability of the exclusionary rule

The exclusionary rule serves two purposes. By excluding evidence obtained in violation of the fourth amendment, the courts try to deter future unlawful invasion by the police.²¹⁰ Secondly, the courts want to preserve judicial integrity by not encouraging or implicitly approving violations of the Constitution.²¹¹ The second purpose is actually contained within the first, since its thrust is to deter fourth amendment

207. 694 F.2d at 207. The court held that under *United States v. Johnson*, 457 U.S. 537 (1982), *Rawlings* must be applied retroactively. 694 F.2d at 207. In *Johnson*, the Court held that fourth amendment decisions should be applied retroactively to "cases still pending on direct appeal unless they represent a clear break with the past." *Johnson*, 457 U.S. at 549. Because *Rawlings* follows *Rakas v. Illinois*, 439 U.S. 128 (1978), the case does not "represent such a break." 694 F.2d at 207.

208. 448 U.S. 98 (1980). The court observed that the facts in *Gallop* resemble those in *Rawlings*. 694 F.2d at 207. In *Rawlings*, the police searched the defendant and others while they were at a friend's house. When police searched Cox's purse, they found LSD and other drugs belonging to the defendant. The Court held that the defendant's fourth amendment rights were not violated unless he had a legitimate expectation of privacy in Cox's purse. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

209. 694 F.2d at 206. *United States v. Lomas*, 706 F.2d 886 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 720 (1984), presented a similar issue within a different fact situation than that in *Gallop*. In *Lomas*, government agents offered evidence that was obtained in an illegal search of co-defendant Margolis' hotel room. Lomas challenged the admissibility of the illegally obtained evidence. The Ninth Circuit remanded the case to determine whether Lomas had a legitimate expectation of privacy in the hotel room registered in Margolis' name. *Id.* at 894-95. The court reemphasized the principle that fourth amendment rights are personal. Hence, Lomas would have the burden of proving that his own fourth amendment rights were violated by the search. *Id.* at 895. While the defendant in *Gallop* had to prove he had an expectation of privacy in his friend's purse, Lomas must prove he had a privacy interest in his friend's hotel room.

210. *United States v. Calandra*, 414 U.S. 338, 347 (1974) (exclusionary rule not applicable in grand jury proceeding because police would not be substantially deterred).

211. *United States v. Janis*, 428 U.S. 433, 458-59 n.35 (1976) ("The primary meaning of 'judicial integrity' . . . is that the courts must not commit or encourage violations of the Constitution.").

violations.²¹²

In *United States v. Garcia-Nunez*,²¹³ the Ninth Circuit held that the government could not circumvent the exclusionary rule by admitting evidence that supported a co-conspirator's conviction but was obtained in violation of the co-defendant's fourth amendment rights.²¹⁴ Alerted by a citizen's report, police officers went to a house, owned by Benson, which they suspected was being used in smuggling illegal aliens. The police followed some men who left the house and drove away in a car. After stopping the car, which defendant Garcia-Nunez was driving, they asked the passengers about their citizenship. The passengers admitted that they were illegal aliens. The officers later searched co-defendant Benson's house and discovered undocumented aliens, including Medina. Benson was charged with conspiring to conceal and transport undocumented aliens,²¹⁵ of harboring an undocumented alien, Medina, and of aiding and abetting defendant Garcia-Nunez in transporting Medina. Medina's testimony was used to convict Garcia-Nunez of transporting illegal aliens. The district court, however, considered Medina's testimony the fruit of an illegal search and hence inadmissible against Benson.²¹⁶ Benson was acquitted of harboring but found guilty of conspiracy and of aiding and abetting Garcia-Nunez in transporting illegal aliens.²¹⁷

212. *Id.*

213. 709 F.2d 559 (9th Cir. 1983).

214. *Id.* at 562.

215. 18 U.S.C. § 371 (1976) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

8 U.S.C. § 1324(a) (1976) provides:

(a) Any person . . . who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, . . . or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, . . . in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years . . .

216. 709 F.2d at 561.

217. *Id.*

On appeal, Benson argued that there was insufficient evidence to support a conviction for aiding and abetting the transporting of illegal aliens because Medina's testimony was the fruit of an illegal search of his house.²¹⁸ The Ninth Circuit agreed and excluded the evidence, even though it supported a co-conspirator's conviction, because it was obtained in violation of Benson's constitutional rights.²¹⁹ The case presented a novel situation: the government was trying to make co-defendant Benson vicariously liable for the acts of Garcia-Nunez even though the only evidence which was used to convict Garcia-Nunez was obtained in violation of Benson's fourth amendment rights.²²⁰ The court concluded that co-conspirator liability was inappropriate here due to the application of the exclusionary rule.²²¹ In deciding whether to apply the exclusionary rule to the case, the court weighed the benefits of deterrence against the social costs of excluding the evidence.²²²

As a general rule, the act of a co-conspirator in furtherance of the conspiracy can be attributed to all conspirators.²²³ The court did not decide whether this rule applied but held that exclusion of the evidence as to Benson was necessary to maintain deterrence.²²⁴ To impute Garcia-Nunez's guilt to Benson would eliminate all deterrent effect and circumvent the exclusionary rule because it would allow the government to indirectly use evidence obtained in violation of Benson's fourth amendment rights.²²⁵ Although the evidence was admissible against Garcia-Nunez because he lacked standing to challenge the search, it should not be admitted against Benson who had standing and whose rights were violated.²²⁶ Therefore, the court concluded that the government could not attribute Garcia-Nunez's guilt to Benson and thereby indirectly use evidence against Benson which was the fruit of an illegal search.²²⁷

218. *Id.* at 562.

219. *Id.* Garcia-Nunez's conviction was procured only through the use of evidence obtained in violation of Benson's fourth amendment rights. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* (citing *United States v. Janis*, 428 U.S. 433 (1976) (exclusionary rule was held not applicable to civil tax proceeding because there was not a sufficient deterrent benefit)).

223. *See Pinkerton v. United States*, 328 U.S. 640 (1945) (a party to a conspiracy may be liable for substantive offenses committed by a co-conspirator in furtherance of the conspiracy even if he does not participate in the offense or have knowledge of it).

224. 709 F.2d at 562.

225. *Id.*

226. *Id.* The court does not explain why Garcia-Nunez lacked standing. Garcia-Nunez probably could not, and did not, show that he had a legitimate expectation of privacy in Benson's house.

227. *Id.*

B. Search Warrants

The fourth amendment proscribes "unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."²²⁸ The constitutional requirements for a search have been the subject of unending controversy. During the past year, the Supreme Court and the Ninth Circuit have decided several cases attempting to deal with a range of issues arising out of a warrant search.

1. Probable cause

In a major redefinition of the requirements for a finding of probable cause based on information obtained from an informant, the Supreme Court in *Illinois v. Gates*²²⁹ rejected the "two-pronged" test first articulated in *Aguilar v. Texas*²³⁰ and refined in *Spinelli v. United States*.²³¹ Under the *Aguilar-Spinelli* test, the magistrate was required

228. U.S. CONST. amend. IV.

229. 103 S. Ct. 2317 (1983).

230. 378 U.S. 108 (1964). In *Aguilar*, a search warrant was issued on the basis of an affidavit stating that "[a]ffiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described premises." *Id.* at 109. The Court held that this affidavit was insufficient because its conclusionary nature denied the magistrate the facts necessary to make an independent determination of probable cause. The Court noted that the affidavit contained no affirmation that the affiant or his unidentified source spoke with personal knowledge of the assertions made. *Id.* at 113. For a warrant issued on the basis of hearsay statements, the Court required that "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that [evidence was where the affiant claimed it was] and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" *Id.* at 114.

231. 393 U.S. 410 (1969). The search warrant in *Spinelli* was based upon an informant's tip that "William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephone[.]" and upon corroborative information gathered by investigating the suspect's movements, phone numbers, and reputation. *Id.* at 413-14.

The Supreme Court held that the information in the affidavit failed to satisfy the requirements in *Aguilar*, particularly the basis of knowledge aspect. *Id.* at 416. Using the facts in *Draper v. United States*, 358 U.S. 307 (1959), *see infra* notes 248-50 and accompanying text, the Court further held that facts corroborating the informant's tip were insufficient to establish probable cause. 393 U.S. at 418. "A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes *Aguilar's* requirements when standing alone." 393 U.S. at 415-16.

The majority in *Gates* cited criticism of the *Spinelli* decision and, although refusing to overrule it, the Court rejected "the rigid categorization suggested by some of its language." 103 S. Ct. at 2332 n.11 (citing *Unites States v. Harris*, 403 U.S. 573, 586 (1971) (Blackmun, J., concurring) ("I continue to feel today that *Spinelli* . . . was wrongly decided."); 8 B. J.

to be informed of facts from which he might determine the basis of the informant's knowledge regarding the existence and location of evidence, and facts from which he might evaluate the informant's veracity.²³²

In *Gates*, Detective Mader of the Bloomingdale Police received an anonymous letter accusing the defendants of dealing in drugs and detailed plans for an upcoming trip during which defendants were to purchase and transport drugs from Florida. According to the letter, Mrs. Gates would drive to Florida and meet Mr. Gates, who would fly down and drive the car and drugs back to Illinois.²³³ Mader confirmed the defendants' identity and verified that Mr. Gates had made a reservation on a flight to West Palm Beach as predicted. He was later informed that Mr. Gates had arrived in Florida, had stayed in a room

MOORE & M. WAXNER, MOORE'S FEDERAL PRACTICE § 41.04 (1984) ("The *Aguilar-Spinelli* formulation has provoked much litigation . . .").

232. 378 U.S. at 114-15. Drawing from the language of *Aguilar*, many courts have bifurcated the "veracity prong" into "credibility" and "reliability" spurs. *Gates*, 103 S. Ct. at 2327 n.4; see, e.g., *Stanley v. State*, 19 Md. App. 507, 525, 313 A.2d 847, 859 (Md. Ct. Spec. App. 1974) ("veracity prong" may be satisfied either by showing the informant to be credible or his information reliable).

Furthermore, the "veracity" prong of the test may be satisfied absent knowledge of an informant's credibility when the information was supplied against the informant's penal interest. See *United States v. Harris*, 403 U.S. 573 (1971).

An informant's failure to supply underlying facts showing his basis of knowledge may be remedied by the "self-verifying detail" of the tip. See, e.g., *Spinelli*, 393 U.S. at 416 (citing *Draper v. United States*, 358 U.S. 307 (1959)).

Finally, where information supplied by an informant is partially corroborated by the investigating officer, some courts have upheld affidavits that otherwise would not have met the requirements of the two-prong test. Authority is split, however, as to whether this self-verifying detail is usable to remedy defects only in the "veracity" prong. See 1 LA FAVE, SEARCH AND SEIZURE § 3.3 (1978); *Stanley v. State*, 19 Md. App. 507, 313 A.2d 847 (Md. Ct. Spec. App. 1974); *People v. Gates*, 82 Ill. App. 3d 749, 754-55, 403 N.E.2d 77, 81 (1980).

233. 103 S. Ct. at 2325. The letter read as follows:

This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over \$100,000.00 in drugs. Presently they have over \$100,000.00 worth of drugs in their basement.

They brag about the fact they never have to work, and make their entire living as pushers.

I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.

Lance & Susan Gates
Greenway
in Condominiums

Id.

registered to "Susan Gates," and had driven north with an unidentified woman the next morning in a car bearing Illinois license plates. Mader then obtained a warrant to search the Gates' house and car. Upon executing the warrant, agents found three hundred and fifty-two pounds of marijuana in the Gates' car, and marijuana, weapons, and other contraband inside their home.²³⁴

Affirming the trial court's suppression of the evidence obtained in the search, the Illinois Supreme Court rigorously applied the *Aguilar-Spinelli* test, and held that the affidavit failed both the reliability and basis of knowledge prongs.²³⁵ The United States Supreme Court reversed.²³⁶ While the Court acknowledged that "'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant" in the determination of probable cause, it held that these elements should not be regarded as "independent requirements to be rigidly exacted in every case"²³⁷ Instead, the Court substituted a "totality of the circumstances analysis" under which a reviewing court must simply ensure that the magistrate had a "substantial basis for . . . conclud[ing] that probable cause existed."²³⁸

234. *Id.* at 2325-26.

235. *People v. Gates*, 85 Ill. 2d 376, 390, 423 N.E.2d 887, 891 (1981). The Illinois Supreme Court ruled that the informant's letter failed the "basis of knowledge prong" because it contained no indication that the writer had personal knowledge of the activities described therein. *Id.* at 384, 423 N.E.2d at 891. Finally, the court held that the corroborating statements by Mader in the affidavit were insufficient to satisfy either prong of the test. *Id.* at 389, 423 N.E.2d at 893.

236. 103 S. Ct. at 2336.

237. *Id.* at 2327-28. The Court stated:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 2322.

238. *Id.* (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). In formulating its "totality of the circumstances analysis," the Court drew upon three cases representing an analytical thread which it argued were never completely harmonized with the *Aguilar-Spinelli* line of cases.

In *Brinegar v. United States*, 338 U.S. 160 (1948), the Court rejected the notion that probable cause must be proven by admissible evidence. *Id.* at 172-75. The defendant had a reputation for hauling illegal liquor, had been arrested before by the agents for illegally transporting liquor, had been seen loading contraband into his car two times in the past six months, and was driving a car appearing to be "heavily loaded." *Id.* at 162. In upholding a warrantless search of the defendant's vehicle, the Court noted the distinction between the evidence required to prove guilt and to show probable cause.

Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence [admissible under the Constitution and rules of evidence].

. . . .

In dealing with probable cause, however, as the very name implies, we deal

Writing for the majority, Justice Rehnquist argued that the substantial basis approach was more consistent with the Court's prior treatment of probable cause than the more elaborate *Aguilar-Spinelli* test.²³⁹ "Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception."²⁴⁰ The Court reasoned that since many warrants are drafted by "nonlawyers in the midst and haste of a criminal investigation[, the] 'built-in subtleties' of the 'two pronged test' are particularly unlikely to assist magistrates in determining probable cause."²⁴¹

Rehnquist stated that courts of appeal should give great deference

with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Id. at 174-75.

In *Jones v. United States*, 362 U.S. 257 (1960), members of the District of Columbia Narcotics Squad searched the defendant's apartment pursuant to a warrant which stated that the officers had been informed by an informant that he had personally purchased heroin from the defendants inside their apartment on many occasions. This same information had been given to other officers through other sources of information, and the informant had given reliable information to the officers "on previous occasion [sic]." *Id.* at 267-68 n.2. The Court held that hearsay may support a search warrant "as long as a substantial basis for crediting the hearsay is presented." *Id.* at 269.

A search warrant based on allegations that an officer had observed activities suggestive of the manufacture of illegal whiskey was upheld in *United States v. Ventresca*, 380 U.S. 102 (1965). The *Ventresca* Court cautioned against "interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *Id.* at 109.

The Court in *United States v. Harris*, 403 U.S. 573 (1971) (5-4 decision), used a "substantial basis" approach to uphold a warrant where no underlying facts showing the informant's credibility were provided in the affidavit. The warrant was based upon an officer's knowledge of the suspect's reputation and the assertion that his informant was "a prudent person." *Id.* at 575. The Court stated that "*Aguilar* cannot be read as questioning the 'substantial basis' approach of *Jones*," and held that the information proffered in the affidavit was sufficient, in total, to establish the veracity of the informant. *Id.* at 581.

In his comprehensive and colorful analysis of the *Aguilar-Spinelli* test, Judge Moylan of the Maryland Court of Special Appeals had rejected the existence of a "substantial basis" alternative. *Stanley v. State*, 19 Md. App. 507, 522, 313 A.2d 847, 852-57 (1974). Judge Moylan argued that *Jones* and *Draper*, decided before *Aguilar*, would have been decided the same way under *Aguilar-Spinelli*. 19 Md. App. at 516-17, 313 A.2d at 853-54. Likewise, Judge Moylan noted that the Court in *Ventresca* itself demonstrated that the facts alleged in that case were sufficient under *Aguilar*. 19 Md. App. at 518, 313 A.2d at 854. Judge Moylan characterized the plurality's holding in *Harris* as a mere "peripheral collision" with *Aguilar-Spinelli* regarding statements against penal interest. 19 Md. App. at 520-21, 313 A.2d at 855. "The cases themselves are reconciled and rumours of their estrangement, ill-founded. There is simply no 'substantial-basis-for-crediting' or 'totality-of-circumstances' alternative test. Those who posit a looser approach offer not an alternative analysis but only a flight from analysis." 19 Md. App. at 522, 313 A.2d at 856.

239. 103 S. Ct. at 2328. See *supra* note 238.

240. 103 S. Ct. at 2328.

241. *Id.* at 2331 (quoting *Stanley v. State*, 19 Md. App. 507, 313 A.2d 847, 860 (Md. Ct. Spec. App. 1974)).

to a magistrate's determination.²⁴² To hold otherwise, he argued, would engender uncertainty regarding the magistrate's determinations, encouraging law enforcement officers to forego obtaining a warrant.²⁴³ Furthermore, the Court stated that the complex and hypertechnical formulation of probable cause under the *Aguilar-Spinelli* test interferes with law enforcement and impedes its ability to provide security for the public.²⁴⁴

The Court reasoned that the rigid guidelines of the *Aguilar-Spinelli* test are antithetical to the diverse factual situations requiring a probable cause determination.²⁴⁵ Under the majority's approach, a deficiency in an informant's basis of knowledge might be overlooked if that informant was of unusual credibility. Conversely, an affidavit lacking sufficient indication of the informant's veracity might be remedied by an unusually detailed description of facts observed first-hand.²⁴⁶

Applying this more flexible standard, the Court held that the informant's detailed letter, independently corroborated by Mader, together with the nature of the suspect's activity, was sufficient for a magistrate to find that there was a "fair probability" that the author of the anonymous letter had reliable knowledge of the Gates' illegal activities.²⁴⁷

In upholding the magistrate's determination, the Court compared the facts in *Gates* with those in *Draper v. United States*,²⁴⁸ a case frequently used as a benchmark for the determination of probable cause. In *Draper*, a police officer received a tip that defendant was a narcotics dealer, and would be returning by train from a trip with three ounces of heroin. The informant described the suspect's appearance and dress, and stated that he would be carrying a tan zipper bag and "walked real fast."²⁴⁹ The defendant was arrested at the train station after officers observed that he matched the description given by the informant. The *Draper* Court held that the detailed nature of the tip, together with the officer's corroboration of the information was sufficient to establish

242. *Id.*

243. *Id.*

244. *Id.* at 2331-32.

245. *Id.* at 2328-29.

246. *Id.* at 2329.

247. *Id.* at 2334-35. The Court stated that the information obtained by Mader and the DEA agents alone suggested the Gates were involved in drug dealing. The Court pointed out that Florida is a known source of drugs, Lance Gates' actions were suggestive of a drug run, the information in the letter was corroborated by Mader, and the letter was very detailed. *Id.* at 2334.

248. 358 U.S. 307 (1959).

249. *Id.* at 309.

probable cause.²⁵⁰ The majority in *Gates* likewise found that the anonymous letter and the Gates' actions corroborating it were as suggestive of criminal activity as the informant's corroborated tip in *Draper*.²⁵¹

In his concurring opinion, Justice White argued that the warrant should be upheld, but under the *Aguilar-Spinelli* formulation.²⁵² White believed that, while the anonymous tip was itself insufficient to furnish probable cause, the officers' corroboration provided sufficient additional facts from which a magistrate could infer both that the informant was credible and his information reliable. Justice White argued that the Court was avoiding its responsibility to provide guidance to lower courts by replacing the *Aguilar-Spinelli* test with a less precise probable cause standard.²⁵³ Although Justice White agreed that some lower courts had applied the two-pronged test in an overly inflexible manner, he advocated clarifying the rule concerning corroborating information rather than abandoning the *Aguilar-Spinelli* test.²⁵⁴ Justice White pointed out that, under the majority's standard, an unquestionably *reliable informant's* tip might be accepted without an adequate showing of his basis of information, when such information given by a police officer has traditionally been held insufficient to show probable cause.²⁵⁵

In a dissenting opinion, Justice Brennan argued that the result reached by the majority would erode the role of the magistrate by allowing him to accept judgments made by affiants without providing facts sufficient for the magistrate to make an independent determination.²⁵⁶ Justice Brennan argued that without the structure provided by the *Aguilar-Spinelli* test it was more probable that a magistrate could issue a warrant without reliable information from a credible person. Such a possibility, argued Justice Brennan, would "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."²⁵⁷

Justice Stevens, in a separate dissent, argued that the facts alleged

250. *Id.* at 314.

251. 103 S. Ct. at 2334. The majority observed that the tip in *Draper* may not have satisfied the *Aguilar-Spinelli* test because the tip contained scant information concerning the informant's reliability and his source of information. *Id.* at 2334 n.12.

252. *Id.* at 2347 (White, J., concurring).

253. *Id.* at 2351 (White, J., concurring).

254. *Id.* at 2350-51 (White, J., concurring).

255. *Id.* at 2350 (White, J., concurring) (citing *Whiteley v. Warden*, 401 U.S. 560, 564-65 (1959); *Jones v. United States*, 362 U.S. 257, 269 (1960); and *Nathanson v. United States*, 290 U.S. 41 (1933)).

256. 103 S. Ct. at 2359 (Brennan, J., dissenting).

257. *Id.* (Brennan, J., dissenting).

in the affidavit were insufficient to allow a finding of probable cause.²⁵⁸ Justice Stevens also contended that greater deference should have been given to the three state courts that reviewed and rejected the magistrate's finding of probable cause.²⁵⁹

In its concern over avoiding "seriously impeding the task of law enforcement,"²⁶⁰ the majority in *Gates* has significantly eroded the constitutional protection against an unreasonable search that has been developed by the Court over the past nineteen years. As both Justices Brennan and White point out in their dissenting and concurring opinions, the conclusory allegations of even a presumptively reliable police officer have been held insufficient to establish probable cause without providing a magistrate with facts which allow him to make an independent judgment as to the affiant's basis of knowledge.²⁶¹ To the extent that the relaxation of this requirement allows a magistrate to accept the conclusions of the "usually reliable" informant without an independent evaluation of the underlying circumstances from which the informant came to that conclusion, the requirement that probable cause will be determined only by a neutral and detached magistrate is undermined.²⁶²

Moreover, while it is arguable that the two-prong test has been applied by some courts in an unnecessarily technical fashion,²⁶³ it is not necessary to abandon the principles of *Aguilar-Spinelli* in order for magistrates to make probable cause determinations in a "practical, nontechnical" manner. Indeed, as Justice White demonstrated in his

258. *Id.* at 2361 (Stevens, J., dissenting). Justice Stevens pointed out that instead of returning immediately after leaving the car in Florida and returning alone as the informant had predicted, Mrs. Gates stayed and returned with her husband. Justice Stevens contended that this discrepancy undermined the credibility of the informant's tip.

259. *Id.* at 2361-62 (Stevens, J., dissenting).

260. *Id.* at 2331.

261. See *Nathanson v. United States*, 290 U.S. 41 (1933) (statement by affiant that "he has cause to suspect and does believe" that illegal liquor on premises insufficient for probable cause); *Giordenello v. United States*, 357 U.S. 480 (1958) (warrant insufficient where no allegation that affiant spoke with personal knowledge, no indication of source of belief, or any other sufficient basis for probable cause).

262. See *United States v. Harris*, 403 U.S. 573, 588 (1971) in which Justice Harlan states:

[O]ur cases have established that where the affiant relies upon the assertions of confidants to establish probable cause, the affidavit must set forth facts which enable the magistrate to judge for himself both the probable credibility of the informant and the reliability of his information, for only if this condition is met can a reviewing court be satisfied that the magistrate has fulfilled his constitutional duty to render an independent determination that probable cause exists.

Id. (Harlan, J., dissenting).

263. See *Bridger v. State*, 503 S.W.2d 801 (Tex. Crim. App. 1974); *People v. Palanza*, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (Ill. App. 1978); *People v. Brethauer*, 482 P.2d 369 (Colo. 1971).

concurrence, it was possible to uphold the search in *Gates* under *Aguilar-Spinelli*.²⁶⁴

The affidavit used to establish probable cause for a search of the defendants' homes was held sufficient in *United States v. Foster*.²⁶⁵ The affiant, an experienced agent, declared that defendant Foster headed a major heroin distribution ring and that Gibson was his lieutenant;²⁶⁶ that narcotics had been seen in Foster's home and that Foster had admitted maintaining false records to deceive the Internal Revenue Service;²⁶⁷ and that Gibson had participated in drug sales and rented a beeper like those used in Foster's organization.²⁶⁸ In the affiant's opinion, drugs and drug paraphernalia would likely be found in the suspects' residences.²⁶⁹

Appellants contended that there was no probable cause to suspect that evidence would be found in the appellants' homes.²⁷⁰ While the Ninth Circuit agreed that probable cause to search does not follow from probable cause to arrest,²⁷¹ it nevertheless found that the information in the affidavit was sufficient to establish probable cause to search the residences.²⁷² Appellants also claimed that, since the information

264. 103 S. Ct. at 2347 (White, J., concurring).

265. 711 F.2d 871 (9th Cir. 1983). Defendants were convicted of possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a) (1976) which states in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, a controlled substance." Defendants were also convicted of conspiracy to possess heroin with intent to distribute, in violation of 21 U.S.C. § 846 (1976), which states: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both"

266. 711 F.2d at 878-79.

267. *Id.* The affidavit alleged that narcotics had been seen at Foster's home on several occasions. The allegation concerning Foster's statement was obtained through an informant. *Id.*

268. *Id.* The affidavit's allegation concerning the beeper was based upon business records. *Id.*

269. *Id.* at 878. All the warrants used to search the defendant's residences were supported by this single affidavit. The affidavit stated that based on agent Williams' eleven years experience as a narcotics agent he thought drug-related evidence would be found at both residences. *Id.*

270. *Id.* at 878-79.

271. *Id.* at 878 (citing *United States v. Valenzuela*, 596 F.2d 824, 828 (9th Cir.) (dictum) (search of residence invalid where officers only had probable cause to arrest defendant), *cert. denied*, 441 U.S. 965 (1979)). The court noted that a valid search warrant must be based on facts showing probable cause to believe the evidence is currently located at the place described. *Id.* at 878.

272. *Id.* at 878-79. In reaching this conclusion, the court noted the practical nature of the determination of probable cause, requiring that the affidavit be given a "common sense and realistic interpretation." *Id.* at 878 (citing *United States v. Chesher*, 678 F.2d 1353, 1359 (9th Cir. 1982)). See also *United States v. Ventresca*, 380 U.S. 102, 108 (1965) (observation of large amounts of sugar and gasoline cans and smell of fermenting mash enough to support

in the affidavit concerning observations of drugs and drug sales was several months old, it was too "stale" to support a finding of probable cause.²⁷³ The court disagreed, holding that the passage of time did not preclude a magistrate's determination that probable cause existed where the defendants' actions indicated a continuing pattern of criminal activity.²⁷⁴

The court disposed of Foster's contention that the affiant's failure to include exculpatory statements made by Foster²⁷⁵ entitled him to a hearing under *Franks v. Delaware*.²⁷⁶ Since a magistrate could reasonably have found probable cause even if the statements had been disclosed, the court concluded that the officer's failure to make that disclosure was not prejudicial to the defendant.²⁷⁷

The Ninth Circuit also rejected defendant Gibson's claim that nothing in the affidavit connected him with the residences searched.²⁷⁸ The court stated that the gas company records listing his wife as a resident of the house supplied sufficient facts from which a magistrate could infer that Gibson also resided there.²⁷⁹

In *United States v. Mehrmanesh*,²⁸⁰ the Ninth Circuit rejected the defendant's contention that the warrant issued for the search of his home was overbroad and not supported by probable cause.²⁸¹ In *Mehrmanesh*, a Chicago airport immigration inspector became suspi-

inference of illegal distillery). In this context, the Ninth Circuit stated that agent Williams' opinion based upon eleven years of experience was an important factor for consideration in determining the existence of probable cause. 711 F.2d at 878-79.

273. 711 F.2d at 878-79.

274. *Id.* In making this determination, the court cited *United States v. Reid*, 634 F.2d 469, 473 (9th Cir. 1980) (magistrate correctly found probable cause to search in affidavit containing year-old information concerning an ongoing business in their manufacture), *cert. denied*, 454 U.S. 829 (1981); and *United States v. Huberts*, 637 F.2d 630, 638 (9th Cir. 1980) (month-old observation held not "stale" where continuing counterfeiting operation indicated), *cert. denied*, 451 U.S. 975 (1981). The most recent observation listed in the *Foster* affidavit had been only three months old when the warrant was executed, and Gibson's last payment on his beeper had been made only two months before the search. 711 F.2d at 878-79.

275. 711 F.2d at 879. Foster was referring to three tape-recorded conversations indicating that Foster was no longer selling drugs. *Id.*

276. *See infra* note 347.

277. 711 F.2d at 879. The court found that only one of Foster's statements could have affected the magistrate's finding. *Id.* Since there was evidence in the affidavit linking him to a subsequent drug sale, the court found that failure to consider Foster's earlier statement did not prejudice him. *Id.*

278. *Id.*

279. *Id.* The court noted that "[t]he magistrate need not be convinced beyond a reasonable doubt that the facts in the affidavit [were] true" to find probable cause. *Id.*

280. 689 F.2d 822 (9th Cir. 1982).

281. *Id.* at 834-35.

cious when he found two waybills in hand-luggage belonging to Ali Pirani, an Iranian citizen. The waybills disclosed that Pirani had shipped two packages of personal effects normally carried by passengers to ensure that they arrive safely. One of the waybills was addressed to an East Vista, Arizona residence rented by appellant Mehrmanesh.²⁸² A Chicago customs agent intercepted one of the packages, a suitcase, and discovered heroin inside the lining. Drug Enforcement Administration (DEA) agents were notified and the package sent on to its destination.²⁸³

When appellant's brother and nephew retrieved the package from the airline in Phoenix and brought it to the appellant's home, DEA agents followed. The suspects stopped en route to place a phone call at about the same time a call was received at the Mehrmanesh residence. Shortly after the suspects arrived at the residence, another man emerged, drove away, and was arrested near the home for possession of heroin and cocaine.²⁸⁴

Relying on this information and on an informant's tip that Mehrmanesh was involved in heroin importation, DEA agents obtained a warrant to search the East Vista residence. The suitcase, various drug and drug paraphernalia, and documents linking the appellant with the residence were found inside the residence and hidden within its walls.²⁸⁵ Mehrmanesh was convicted of importing heroin and attempting to possess heroin with intent to distribute it.²⁸⁶

282. *Id.* at 826.

283. *Id.*

284. *Id.*

285. *Id.* at 826-27.

286. Defendant was convicted and sentenced pursuant to the following statutes: 21 U.S.C. § 841 (1976), which provides:

(a) . . . [I]t shall be unlawful for any person knowingly or intentionally—
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a controlled substance.
(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows . . . to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both;

21 U.S.C. § 845 (1976), which provides in part: "Any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is . . . punishable by . . . a term of imprisonment, or a fine . . . up to twice that authorized by section 841"; 21 U.S.C. § 952(a) (1976), which states in part: "It shall be unlawful to import into the customs territory of the United States from any place outside thereof . . . any controlled substance . . ."; 21 U.S.C. § 960(a)(1) (1976), which provides in part: "Any person who . . . knowingly or intentionally imports or exports a controlled substance . . . shall be punished . . ."; 21 U.S.C. § 960(b), which provides:

The Ninth Circuit rejected Mehrmanesh's challenge of the warrant's validity.²⁸⁷ The court reasoned that in light of the defendant's activities, the character of the missing items, the opportunity for concealment, together with inferences concerning likely hiding places, a magistrate could reasonably conclude that the officers were likely to find incriminating evidence at the location searched.²⁸⁸

2. Border searches

Although probable cause is not a requirement for a border search,²⁸⁹ all searches are subject to the fourth amendment prohibition against "unreasonable searches and seizures."²⁹⁰ Body searches have been classified into three "levels of intrusion," each requiring a distinct level of suspicion before the search may be considered reasonable. Officers need only minimal suspicion to conduct a pat-down search.²⁹¹ The standard for a strip search is higher, requiring "real suspicion."²⁹² The most stringent showing is necessary before conducting a body cavity search, where officers must have a "clear indication" that contraband is being concealed.²⁹³ The Ninth Circuit has recently held that, because of the potential adverse effects of x-rays, an x-ray search is subject to the "clear indication" standard.²⁹⁴

In *United States v. Couch*,²⁹⁵ the Ninth Circuit held that a detailed tip reciting the defendant's plan to smuggle cocaine into the United States by concealing it in his body satisfied the "clear indication" stan-

"[T]he person committing such violation shall be imprisoned not more than fifteen years, or fined not more than \$25,000, or both"; and 18 U.S.C. § 2 (1976), which provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Mehrmanesh was sentenced to fifteen years' imprisonment and fined \$25,000 on each count.

287. 689 F.2d at 834.

288. *Id.* The court cited *United States v. Spearman*, 532 F.2d 132 (9th Cir. 1976) as support for this proposition. In *Spearman*, the Ninth Circuit held that it was permissible for a magistrate to infer from evidence of a suspect's drug selling activities that it was probable that evidence of drug dealing would be found in his car. *Id.* at 133.

289. *United States v. Ramsey*, 431 U.S. 606, 611-14 (1977).

290. U.S. CONST. amend. IV.

291. See *United States v. Ramsey*, 431 U.S. 606, 619 (1977) (search of suspect's mail by customs officer allowed upon "reasonable cause to suspect"); *United States v. Perez*, 644 F.2d 1299, 1302 (9th Cir. 1981) (cars entering country subject to search without probable cause).

292. *United States v. Rodriguez*, 592 F.2d 553, 556 (9th Cir. 1979) (strip search allowed upon showing of "real suspicion").

293. *United States v. Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980) (x-ray search upheld upon showing of "real suspicion" and "clear indication").

294. *United States v. Ek*, 676 F.2d 379, 382 (9th Cir. 1982).

295. 688 F.2d 599 (9th Cir. 1982).

dard.²⁹⁶ DEA agents received the information from a confidential informant.²⁹⁷ According to the informant, Couch and another suspect were to take drugs to inhibit and clean out their digestive systems, and then swallow several capsules of cocaine. Agents were also given details of the suspects' travel plans and were informed that Couch had avoided x-ray detection in the past by claiming he had recently been overexposed to them and feared further exposure would damage his health. Upon reentering the country, the defendants were detained while a warrant for an x-ray search was issued. Included in the affiant agent's application were his observations corroborating some of the informant's statements.²⁹⁸

Based in part on the insufficiency of the affidavit, the district court granted Couch's motion to suppress evidence including the x-rays and cocaine capsules excreted by Couch.²⁹⁹ On appeal, the Ninth Circuit reversed the suppression order.³⁰⁰ Applying the *Aguilar-Spinelli* test, the court found that the informant was credible because he had furnished reliable information on five occasions in the past.³⁰¹ In addition, the degree of detail in the tip together with the facts corroborated by the customs agent satisfied the test's "basis of knowledge" prong.³⁰² The court also noted that, although each corroborated fact in the tip was innocent in itself, it was highly unlikely that the suspect's actions, particularly using the same excuse to avoid x-rays, were mere coincidences.³⁰³

296. *Id.* at 606.

297. *Id.* at 600.

298. *Id.* at 600-01. The affidavit also stated that the defendants arrived from Peru, that a prior search revealed no contraband, that Couch refused to be x-rayed for health reasons, and that Couch had neither eaten nor excreted for seven hours. *Id.*

299. *Id.* at 602. Defendant was convicted of importing cocaine in violation of 21 U.S.C. § 952(a) and § 960(a)(1). 21 U.S.C. § 952(a) (1976) states in pertinent part: "It shall be unlawful to import into the customs territory of the United States . . . any controlled substance" 21 U.S.C. § 960 (1976) prohibits "import[ing] or export[ing] a controlled substance" Defendant was also convicted of possession of a controlled substance in violation of 21 U.S.C. § 841(a)(1) (1976).

300. 688 F.2d at 607.

301. *Id.* at 605. *See supra* note 230 and accompanying text.

302. *Id.*

303. *Id.* at 606-07. The court also noted that the agents had followed the procedure recommended in *United States v. Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980) and *United States v. Cameron*, 538 F.2d 254, 258-59 (9th Cir. 1976), by obtaining a court order before subjecting a defendant to an x-ray search. 688 F.2d at 604-05 n.9.

In this pre-*Gates* case, the court ruled that the informant's tip passed the *Aguilar-Spinelli* test because the informer's detailed description of the defendant's plan cured an inadequate disclosure of the informant's basis of information. The court emphasized that the details of that description dealt with both innocent and criminal activities. 688 F.2d at 605-06. *Com-*

The court recently applied the "clear indication" standard in *United States v. Quintero-Castro*³⁰⁴ and *United States v. Mendez-Jimenez*.³⁰⁵ In *Mendez-Jimenez*, a warrant for an x-ray search was upheld where the affidavit contained the following information: the defendant (1) had arrived from Colombia, a known drug source country; (2) was in possession of anti-diarrhea medication; (3) had not consumed food or beverages since leaving Colombia; (4) was confused and uncertain about his travel plans; (5) was carrying only limited identification, a large amount of cash and a passport which looked as if it had been tampered with; (6) appeared very nervous; (7) had paid cash for his airline ticket; and (8) claimed to be vacationing in the United States although he spoke no English and knew no one in the country.³⁰⁶

In *Quintero-Castro*, however, the issuance of a warrant for an x-ray search was overturned. As in *Mendez-Jimenez*, the affidavit stated that the suspect had come from a known drug exporting country, said he was on a short vacation without his family, and planned to stay at a hotel even though he had relatives in the area. The affidavit further stated that Quintero-Castro had paid for his airline ticket in cash, had a large amount of cash in his possession and had given conflicting answers in response to questioning. Unlike the affidavit in *Mendez-Jimenez*, however, there was no allegation that a substance was found that was associated with body-cavity smuggling, no allegation that defendant had refrained from eating or drinking in the recent past, and no evidence of passport tampering. Furthermore, the suspect in *Quintero-Castro* had relatives in the United States. Because it found "fewer factors to support a finding of probable cause," the Ninth Circuit held that the affidavit failed to provide the clear indication of body cavity smuggling necessary for an x-ray search.³⁰⁷

pare *United States v. Larkin*, 510 F.2d 13, 15 (9th Cir. 1974) (corroboration of informant's description of car and license not sufficient to establish probable cause) *with* *United States v. Maher*, 645 F.2d 780, 782 (9th Cir. 1981) (corroboration of informant's description "inherently suspicious" where suspect abandoned car and hitchhiked away). This holding reflects the general trend toward flexibility in approach to the determination of probable cause based on an informer's tip. *See, e.g.*, *United States v. Harris*, 403 U.S. 573 (1971).

304. 705 F.2d 1099 (9th Cir. 1983) (*per curiam*).

305. 709 F.2d 1300 (1983). The defendant was convicted of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1976), *see supra* note 286.

306. 709 F.2d at 1304. The defendant had been stopped by a customs inspector at Los Angeles International Airport. When Mendez-Jimenez refused to consent to an x-ray search, he was detained until the court order could be obtained. *Id.* at 1302. The court found that this detention was not unreasonably intrusive. *Id.* at 1304.

307. 705 F.2d at 1101. In reaching its holding, the court reviewed several cases in which x-ray searches had been upheld. *See* *United States v. Couch*, 668 F.2d 599 (9th Cir. 1982) (informant's tip corroborated by observations of customs officials); *United States v. Ek*, 676

3. Seizures pursuant to a warrant

Private property used to import controlled substances may be seized when the government shows probable cause to believe that the seized property was used in the crime.³⁰⁸ The requisite showing of probable cause to seize property is similar to the standard required for a search warrant.³⁰⁹

In *United States v. One 56-Foot Yacht Named Tahuna*,³¹⁰ the appellant had purchased a yacht which was subsequently seized by the government because its prior owner had allegedly used the vessel to smuggle drugs. In the affidavit supporting the seizure warrant, a DEA agent relied upon statements and diary entries by crew members of an-

F.2d 379 (9th Cir. 1982) (informant's tip corroborated by suspect's refusal to take food or water during detention); *United States v. Purvis*, 632 F.2d 94 (9th Cir. 1980) (detailed observations of suspect's movements and possessions indicating drug smuggling); *United States v. Aman*, 624 F.2d 911 (9th Cir. 1980) (restricted body movements, marijuana and drug smuggling paraphernalia discovered); *United States v. Erwin*, 625 F.2d 838 (9th Cir. 1980) (restricted body movements, suspicious items, arrival from known smuggling source country). The defendant was convicted of possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841 (1976), *see supra* note 286.

308. 21 U.S.C. § 881 (1976) provides in pertinent part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

...
(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances or their raw materials].

Under 49 U.S.C. § 781 (1976) "it shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by any means of any vessel, vehicle, or aircraft." Section 782 of that title provides for the forfeiture of conveyances so used. 49 U.S.C. § 782 (1976).

309. *United States v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978) (*per curiam*); *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106 (9th Cir. 1976) (*per curiam*). The burden of proof in such actions is governed by 19 U.S.C. § 1615 (1976) which provides:

In all suits or actions . . . brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized . . . where the property is claimed by any person, the burden shall lie upon such claimant . . . *provided*, that probable cause shall be first shown for the institution of such a suit or action, to be judged of by the court

...
The Ninth Circuit upheld the constitutionality of 16 U.S.C. § 1615 in *United States v. One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1970). In that case the court held that the forfeiture statutes did not violate the claimant's due process rights because the statutes are "not criminal enough to prevent Congress from imposing the burden of proof on the claimant." *Id.* at 66. *But see* *United States v. United States Coin and Currency*, 401 U.S. 715, 721 (1971) (dictum) ("[T]his Court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment [sic]."); *Devito v. United States*, 520 F. Supp. 127, 130 (E.D. Pa. 1981) (mem.) (owner of seized property alleging no knowledge of illegal use has right to review claim to property under fifth amendment).

310. 702 F.2d 1276 (9th Cir. 1983).

other vessel indicating that the Tahuna was being used to smuggle marijuana, statements of agents regarding the yacht's movements, and the discovery of unidentified seeds in the boat which were suspected to be marijuana.³¹¹

On appeal from a summary judgment entered against him,³¹² the purchaser argued that the government must prove by a preponderance of the evidence that probable cause existed to believe that the property seized was used to transport contraband.³¹³ The Ninth Circuit rejected that contention, holding that the various burdens of proof were not applicable to a showing of probable cause.³¹⁴ The court stated that, since the necessary showing concerns only probabilities, the application of an evidentiary standard would be inappropriate.³¹⁵ Consequently, the government was required only to establish reasonable grounds to believe that the ship was used to transport narcotics.³¹⁶ Appellant also contended that, because the statements in the affidavit were inadmissible as evidence, they could not be used to support the seizure.³¹⁷ In dismissing this contention, the Ninth Circuit reasoned that forcing the government to prove by competent evidence that the vessel had been used in smuggling would undermine the congressional intent to shift the burden of proof to the claimant.³¹⁸

4. Dog searches

In *United States v. Spetz*,³¹⁹ the Ninth Circuit considered whether responses from two detector dogs provided the probable cause neces-

311. *Id.* at 1280. Russell, the mate aboard another vessel, had stated that his boat had transferred 7,000 pounds of marijuana from Thailand to the Tahuna 250 miles west of San Francisco. The cook on Russell's boat also kept diary entries indicating that the "cargo" from the yacht was transferred to the Tahuna. DEA agent Petrotta later boarded the Tahuna by identifying himself as a potential buyer. Petrotta found the seeds in the cargo hold of the vessel. *Id.* at 1279-80.

312. *Id.* at 1280-83. In support of its motion for summary judgment, the government had filed the same affidavit relied upon by the magistrate issuing the seizure warrant. *Id.* Four months later, the district court entered a judgment of forfeiture against the Tahuna. *Id.*

313. *Id.* at 1281. Appellant contended that the government was required to "prove probable cause by at least a preponderance of the evidence if not by clear and convincing evidence." *Id.* at 1282.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 1282-83. The appellants contended that the statements used to obtain the warrant were either inadmissible hearsay or not sufficiently authenticated. *Id.* at 1284.

318. *Id.* at 1283. The court also held that the information obtained through the informants was sufficient under the *Aguilar-Spinelli* test. *Id.* at 1283-87.

319. 721 F.2d 1457 (9th Cir. 1983).

sary to obtain a search warrant.³²⁰ In *Spetz*, members of the United States Customs Special Contraband and Narcotics Interdiction Team had brought the dogs into a customs area where cargo from two ships was being unloaded. The dogs "mildly alerted"³²¹ on two large containers.³²² The officers returned with the dogs two days later after one container had been unpacked in a freight terminal. Both dogs individually alerted on a package from the container. The agents subsequently determined that the addressee on the package had previously been convicted of marijuana smuggling. Based on this information, DEA agent Loveless prepared an affidavit upon which a warrant was obtained and the package was opened, revealing 1440 pounds of marijuana.³²³

Agents set up surveillance and followed two suspects who retrieved the package. The defendants were subsequently arrested at a secluded residence when a sensing device planted in the marijuana indicated that the package was being opened. Agents immediately arrested several other suspects and executed a warrantless search of the residence. Based partially on information obtained in this warrantless search, DEA agents obtained and executed a warrant for a second search of the house.³²⁴ Large amounts of marijuana, narcotics, and narcotics paraphernalia found in and about the house were introduced into evidence at the defendants' trial.³²⁵

Relying on *United States v. Beale*,³²⁶ the Ninth Circuit rejected the

320. *Id.* at 1463.

321. A "'mild alert' . . . consists of lightly biting and scratching the object sniffed. . . . [T]he stronger the scent, the more forcefully the dog will attack the object." *Id.* at 1461 n.2.

322. *Id.* at 1461.

323. *Id.*

324. *Id.* at 1462.

325. *Id.* at 1462-63. All three defendants were convicted of conspiracy to possess and distribute marijuana with intent to distribute in violation of 21 U.S.C. § 846 (1976), *see supra* note 286; Kalik and Spetz were convicted of aiding and abetting in violation of 18 U.S.C. § 2 (1976) which states in pertinent part:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Gulino and Spetz were also convicted of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1976), *see supra* note 286; Spetz was further convicted for possession of marijuana in violation of 21 U.S.C. § 844 (1976), which provides in part: "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance. . . ."

326. 674 F.2d 1327 (9th Cir. 1982). The Ninth Circuit in *Beale* held that the use of dogs to detect the presence of contraband is a fourth amendment intrusion, "albeit a limited one,"

defendants' contention that the dog sniff at the freight terminal failed to supply probable cause to search the container.³²⁷ The court emphasized that the second dog's alert had independently corroborated the indication given by the first dog.³²⁸

Defendants further contended that the warrant was defective because the supporting affidavit contained erroneous information regarding the past reliability of the dogs.³²⁹ The court rejected this contention, reasoning that the relatively minor misstatement would not have influenced the magistrate's judgment of the first dog's reliability, especially in view of the independent corroboration by the second dog.³³⁰

Finally, the court ruled that the agents' search of the defendants' house pursuant to the warrant was not unlawful, although the warrant was partially based on information obtained in the earlier illegal warrantless search.³³¹ The Ninth Circuit found that the substantial quantity of marijuana discovered by the customs agents and the nature of the defendants' activity were sufficient to justify the issuance of the warrant even without the information gathered in the earlier search.³³²

5. Wiretaps

The fourth amendment right of privacy has long been held to extend to phone conversations in which a participant has a reasonable expectation of privacy.³³³ To protect citizens from the unlawful interception of such conversations, Congress has passed legislation designed

and requires a "founded" or "articulable" suspicion that contraband is contained in the area searched. *Id.* at 1335.

327. 721 F.2d at 1463-64. The court upheld the first dog sniff at the terminal because it was conducted in a customs area where goods were being unloaded from foreign ports. *Id.* at 1463. In a footnote, the court noted that "'mere entry alone into the United States from a foreign country is a sufficient reason' for a search." *Id.* at 1463-64 n.13 (quoting *Klein v. United States*, 472 F.2d 847, 849 (9th Cir. 1973)).

328. 721 F.2d at 1464.

329. *Id.* The affidavit stated that one of the dogs had previously alerted correctly on sixty of sixty-six occasions and the other had previously alerted correctly on two of two occasions. In fact, the first dog had been correct on fifty-six of sixty-one occasions and the other on only two of six. *Id.*

330. *Id.* The court observed that, since the omission of this information was neither harmful to the defendants nor "deliberate or in reckless disregard for the truth," the warrant could not be overturned under the standard stated in *Franks v. Delaware*, 438 U.S. 154 (1978). *Id.* at 1464-65.

331. 721 F.2d at 1468. The court found that the warrantless search was unlawful because the facts failed to sufficiently indicate that suspects inside the house were armed and dangerous. *Id.* at 1467.

332. *Id.* at 1468.

333. *See Katz v. United States*, 389 U.S. 347 (1967).

to prohibit electronic surveillance except upon compliance with specified stringent conditions.³³⁴

In *United States v. Brooklier*,³³⁵ the district court summarily denied Brooklier's motion to suppress his tape-recorded conversation with "Jimmy the Weasel" Fratianno, an FBI informant, concerning an extortion plan.³³⁶ On appeal, Brooklier contended that the affidavit supporting the surveillance authorization failed to comply with the federal wiretap statute,³³⁷ which requires a "full and complete statement" as to why other methods of investigation had or would have failed.³³⁸ Brooklier contended that the electronic surveillance was unnecessary because Fratianno could have infiltrated the group under investigation. He further contended that the tapes should have been excluded because the affiant officer had failed to inform the magistrate that Fratianno was cooperating with the government.³³⁹

While agreeing that the government should have included the facts concerning Fratianno,³⁴⁰ the Ninth Circuit nevertheless held that the district court's failure to hold a hearing and its admission of the taped conversation was not error.³⁴¹ The court relied on *Franks v. Delaware*,³⁴² which requires an evidentiary hearing when the defendant establishes that an affiant has deliberately included a false statement in

334. See 18 U.S.C. §§ 2510-2520 (1976).

335. 685 F.2d 1208 (9th Cir. 1982) (per curiam).

336. Brooklier and his co-defendants were accused of extorting money from pornographers and bookmakers. After a seven-week trial, Brooklier was convicted of conspiracy and racketeering in violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1962 (1976), which provides in part: "It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in acquisition of any interest in . . . any enterprise which is engaged in . . . interstate commerce." Brooklier was also convicted of violating the Hobbs Act, 18 U.S.C. § 1951 (1976), which provides in part: "Whoever in any way or degree obstructs, delays, or affects commerce . . . or commits or threatens physical violence to any person or property . . . shall be fined not more than \$10,000 or imprisoned not more than twenty years or both."

337. 18 U.S.C. § 2518(1)(c) (1976) provides in pertinent part:

Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter . . . shall include the following information:

. . . .

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

338. 685 F.2d at 1221.

339. *Id.*

340. The government argued that it need not have recited the facts concerning Fratianno because he was not a fully cooperative informant when the recordings were made. *Id.*

341. *Id.* at 1222.

342. 438 U.S. 154 (1978).

the warrant affidavit. The Ninth Circuit concluded that, although the government may have negligently prepared the affidavit, the exclusion of the tapes was not required because there was no evidence of *deliberate* omission of material information.³⁴³

The Ninth Circuit's use of the *Franks* test to dispose of this issue is analytically unconvincing. The federal wiretap statute is designed to protect the privacy of wire and oral communications and to provide uniform criteria under which electronic surveillance may be obtained.³⁴⁴ It imposes an *affirmative duty* on officers to show the lack of probable success of other investigative methods before a wiretap can be permitted and provides for the exclusion of evidence in violation of these requirements.³⁴⁵ The rule in *Franks* was adopted to apply to false statements made in support of an application for a search warrant. Application of the *Franks* test in these circumstances operates to circumvent the clear purpose of the statute by exempting negligent noncompliance.³⁴⁶

6. Warrants obtained by false statements

When a defendant shows that a warrant was obtained through the use of reckless or deliberate false statements in the underlying affidavit, and the affidavit would be insufficient to establish probable cause without these statements, the defendant is entitled to a hearing to determine

343. 685 F.2d at 1222. The court stated that the defendant has the burden of showing that an omission was made deliberately or in bad faith. *Id.* at 1221. Mere negligence is insufficient to justify suppressing the evidence. *Id.*

344. In *Gelbard v. United States*, 408 U.S. 41 (1972), the Supreme Court interpreted the intent of Congress in enacting Title III of the Omnibus Crime Control Act, 18 U.S.C. §§ 2510-2520 (1976), by quoting from the Senate committee report that accompanied the Act: "Title III has its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." The Court then noted the congressional intent to exclude evidence obtained by illegal electronic surveillance: "The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." *Gelbard*, 408 U.S. at 48, 50.

345. 18 U.S.C. § 2518(1)(c) (1981). See *supra* note 344.

346. Section 2518 contains its own exclusionary clause, which the court did not address in its opinion:

(10) (a) Any aggrieved person in any trial . . . may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully interpreted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face

18 U.S.C. § 2518(10)(a) (1981). In view of the clear congressional intent to exclude evidence obtained in violation of the wiretap statute, the court's decision to engraft the requirements under *Franks* is especially questionable.

whether the warrant should be invalidated.³⁴⁷

In *United States v. Davis*,³⁴⁸ the Ninth Circuit reversed the defendant's conviction for importation of hashish oil and remanded the case for retrial.³⁴⁹ During an investigation of the murder of the defendant's business associate, police applied for two search warrants to search both the defendant's business (PDI offices) and a residence known as 71 Blue Lagoon.³⁵⁰ In the warrant application for the Blue Lagoon property, the officer in charge of the investigation stated that he had personally spoken with three confidential informants. In fact, that officer had not personally interviewed these informants, but had gathered most of the information in the affidavit from subordinate officers.³⁵¹ Although he became aware of the inaccuracy after the affidavit had been typed, the officer failed to correct it.³⁵²

In an earlier appeal challenging the validity of both warrants, the Ninth Circuit had found that the defendant was entitled to an evidentiary hearing under *Franks v. Delaware*³⁵³ to determine whether the officer had deliberately or recklessly misstated the truth in the warrant application.³⁵⁴ On remand, the district court found that the officer had not deliberately or recklessly falsified the affidavit because the police officer believed all the underlying information in the affidavit was true.³⁵⁵

The Ninth Circuit held that the district court's conclusion was clearly erroneous because it overlooked the officer's statements claim-

347. *Franks v. Delaware*, 438 U.S. 154 (1978). In *Franks*, affiant officers had stated in their application for a search warrant that they had interviewed the suspect's employers, who had informed the officers that the suspect normally wore clothes similar to those described by a rape victim. The defendant claimed that no such interview had taken place, and sought an evidentiary hearing on the ground that the warrant was procured by false statements. The Supreme Court ruled that when a defendant makes an initial showing that a warrant was procured by deliberate falsehood or reckless disregard for the truth, and the warrant without the disputed statements would be insufficient to establish probable cause, the defendant is entitled to a hearing to determine the validity of the affidavit. *Id.* at 171.

348. 714 F.2d 896 (9th Cir. 1983).

349. *Id.* at 901.

350. *Id.* at 897. The search of the residence resulted in the discovery of a notebook subsequently introduced at trial. *Id.*

351. *Id.* at 897-98.

352. *Id.*

353. 438 U.S. 154 (1978). *See supra* note 347.

354. *United States v. Davis*, 663 F.2d 824 (9th Cir. 1981). In the first *Davis* appeal, the Ninth Circuit held that, although the affidavits stated sufficient facts for the magistrate to infer probable cause, an evidentiary hearing was required because the defendant had made the showing required under *Franks*. *Id.* at 830.

355. 714 F.2d at 897.

ing his personal knowledge of the facts alleged in the affidavit.³⁵⁶ The court observed that, while the affiant could have relied upon the statements of the junior officer, his failure to properly identify the sources of his information made it impossible for the magistrate to make an independent determination of probable cause.³⁵⁷

The court also rejected the government's contention that the misstatements in the affidavit were harmless because the magistrate who read it was aware of the true facts, having also read the affidavit underlying the warrant for the PDI offices. The court responded that the government's use of such an affidavit "runs the risk" that an appellate court might find such misstatements material.³⁵⁸

The district court offered two alternative bases for validating the search: (1) the affidavit was sufficient to establish probable cause even without the disputed portions; or (2) admission of the evidence obtained during the search, a notebook, was harmless error.³⁵⁹ The Ninth Circuit summarily rejected both contentions, holding that these issues were foreclosed by the court's holding in the prior appeal.³⁶⁰

356. *Id.* at 898. The court stated that although probable cause did exist, that fact alone could not remedy the defect in the affidavit. *Id.* at 899.

357. *Id.* at 900. The Ninth Circuit distinguished cases where one police officer's knowledge was imputed to another for the purpose of the determination of probable cause because a magistrate is not allowed to rely upon the judgments of others in determining probable cause. *Id.* See *United States v. Steed*, 465 F.2d 1310, 1315 (9th Cir.) (officer entitled to rely on information from fellow officer to establish probable cause), *cert. denied*, 409 U.S. 1078 (1972); *United States v. Bernard*, 607 F.2d 1257, 1266-67 (9th Cir. 1979) (collective knowledge of all agents involved in investigation sufficient for all probable cause).

358. 714 F.2d at 900. In support of this position, the court cited *Keeble v. Sultmeier*, 290 F.2d 127 (9th Cir. 1961), where a debtor's discharge in bankruptcy was revoked because he made a false oath during a creditor's meeting. *Id.* at 129. The court found these false statements to be material, notwithstanding the fact that the trustee was aware of the existence of the property about which the debtor lied. *Id.* at 131. "A 'false oath cannot be justified on the ground that the person to whom it is made knows or should know the truth despite the falsehood.'" *Id.*

359. 714 F.2d at 900.

360. *Id.* at 900-01. The government relied upon *United States v. Fogarty*, 663 F.2d 928, 930 (9th Cir. 1982), which was decided after the first *Davis* appeal, but before the second. In *Fogarty*, the Ninth Circuit held that two related affidavits presented to the magistrate simultaneously were individually sufficient for him to determine probable cause. That court also indicated that there is "no restriction which limits a magistrate to the four corners of a single affidavit when facts are presented simultaneously in two related affidavits seeking two warrants." *Id.* at 930. The *Davis* court refused to read *Fogarty* as allowing a magistrate to determine probable cause by reference to a second affidavit. 714 F.2d at 900 (citing *United States v. Dudek*, 560 F.2d 1288, 1292-93 (6th Cir. 1977) (facts in two affidavits filed simultaneously usable to determine probable cause), *cert. denied*, 434 U.S. 1037 (1978)).

7. Scope of the search

The fourth amendment requirement that a search warrant must particularly describe the places to be searched and things to be seized³⁶¹ is designed to discourage general searches by preventing "the seizure of one thing under a warrant describing another."³⁶² Minimal discretion is left to the executing officer to determine the warrant's scope.³⁶³

In *United States v. Williams*,³⁶⁴ the Ninth Circuit held that a warrant describing an isolated rural area according to its geographical location was sufficient to enable the executing officers to reasonably identify the place to be searched.³⁶⁵

While conducting an aerial search, officers of the Josephine County Sheriff's Department observed marijuana plants growing on remote mining claim sites. The officers prepared an affidavit for a search warrant, describing the area to be searched according to mining claim numbers, township, range, section, and meridian. The affidavit also included descriptions of three buildings located on the property. A warrant was issued authorizing a search of the "premises" described in the affidavit, but omitting explicit reference to the buildings thereon. The officers were authorized to search for "evidence of active cultivation of marijuana, and evidence of its cultivator."³⁶⁶

When the officers executed the warrant, they discovered several plots of marijuana plants on the grounds. Inside one of the buildings, deputies found a lunch box labeled "L.K. Williams" which contained homemade explosive devices. Williams was subsequently arrested and convicted of firearms violations.³⁶⁷

In upholding the validity of the warrant, the Ninth Circuit stated that "practical accuracy rather than . . . technical precision" should govern whether a warrant sufficiently describes the place to be

361. U.S. CONST. amend. IV.

362. *Marron v. United States*, 275 U.S. 192, 195 (1927). The prohibition in the Constitution against unreasonable searches and seizures reflects the intention of its authors to prevent the practice, prevalent in the colonies, of using "writs of assistance," in which revenue officers were empowered to search at their discretion for smuggled goods. *Id.* at 195.

363. *Id.* at 196.

364. 687 F.2d 290 (9th Cir. 1982).

365. *Id.* at 291-92.

366. *Id.*

367. *Id.* at 292. Williams was convicted of possession of homemade mines in violation of 26 U.S.C. § 5861 (1976) which provides in part: "It shall be unlawful for any person . . . (c) to receive or possess a firearm made in violation of the provisions of this chapter; or . . . (d) to receive or possess a firearm which is not registered to him . . . or . . . (f) to make a firearm in violation of the provisions of this chapter. . . ."

searched.³⁶⁸ The court also noted that the requisite degree of specificity will vary from an urban to a rural setting.³⁶⁹

The Ninth Circuit further held that neither the search of the buildings nor the search of the lunch box exceeded the scope of the warrant.³⁷⁰ The court defined the word "premises" to include the "land and the tenements or appurtenances thereto."³⁷¹ Consequently, the court found that the magistrate intended to authorize a search of the buildings. Having discovered the marijuana fields near the buildings, the officers could reasonably believe that evidence of marijuana cultivation would be found inside the buildings.³⁷² With respect to the lunch box, the court stated that it was reasonable to infer that evidence of marijuana cultivation would be found inside. The court reasoned that a suspect should not be able to frustrate a lawful search by merely concealing the contraband inside a closed container. Once the box was opened, the court held, the explosives were seizable under the plain view doctrine.³⁷³

Although it disapproved of the government's wholesale seizure of documents not mentioned in the warrant, the Ninth Circuit, in *United States v. Tamura*,³⁷⁴ held that those documents obtained in the search which were described in the warrant were properly admitted into evidence.³⁷⁵

Defendants Marubeni America Corporation (Marubeni) and its employee Tamura were suspected of obtaining supply contracts with an Alaskan telephone utility through a bribery scheme.³⁷⁶ In June of 1978, FBI agents searched Marubeni's Los Angeles office pursuant to a

368. 687 F.2d at 292 (citing *United States v. Ventresca*, 380 U.S. 102, 108 (1965)); see *supra* note 238.

369. 687 F.2d at 293.

370. *Id.*

371. *Id.* (quoting *United States v. Meyer*, 417 F.2d 1020, 1023 (8th Cir. 1969)). In *Meyer*, the Eighth Circuit upheld a search of buildings at a specified location described as "80 acres in the name of Otto Lewis Meyer and Margie M. Meyer." For the word "premises," the court used the definition from BLACK'S LAW DICTIONARY, 1344 (4th ed. 1957) which provides: "Lands and tenements; and estate; land and buildings thereon"

372. 687 F.2d at 293.

373. *Id.* (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971)).

374. 694 F.2d 591 (9th Cir. 1982).

375. *Id.* at 597.

376. *Id.* Marubeni would bribe employees of the Anchorage Telephone Utility (ATU) in order to obtain inside information which would enable Marubeni to obtain supply contracts with ATU at artificially high prices. For his part in the scheme, Tamura was convicted on fifty-ninety counts of bribery, mail and wire fraud, conspiracy, racketeering and Travel Act violations.

warrant.³⁷⁷ However, agents were unable to find the documents indicated in the warrant from the corporation's voluminous files. When employees refused to help with the search, the agents removed all accounting records for the years in question.³⁷⁸ The government kept these records until shortly before trial, refusing to return them unless the defendants would stipulate to their authenticity.³⁷⁹

Tamura contended that the trial court had erred in admitting seized documents described in the warrant because the FBI's wholesale seizure of Marubeni's records exceeded the scope of the warrant.³⁸⁰ The Ninth Circuit held that the FBI's seizure of the company's accounting records was unreasonable.³⁸¹ It further characterized the government's retention of the records in order to coerce the defendants as "highly improper" and "the kind of investigatory dragnet that the fourth amendment was designed to prevent."³⁸²

377. The warrant authorized officers to search for records of contracts for the sale of cable, records of bribe payments, and travel records. *Id.* at 594.

378. *Id.* at 595. The accounting records for the years in question included eleven cardboard boxes of computer printouts, thirty-four file drawers of vouchers, and seventeen drawers of cancelled checks. *Id.*

379. *Id.*

380. *Id.* Tamura did not challenge the validity of the warrant nor the scope of the search at the Marubeni offices, but merely the scope of the seizure. *Id.*

381. *Id.* at 596. The government contended that the seizure was not unreasonable because of the difficulty of separating the documents sought from the company's general records. The court disagreed, noting the general rule that only items specifically identified in the warrant may be seized. *Id.* (citing *United States v. Honore*, 450 F.2d 31, 33 (9th Cir. 1971), *cert. denied*, 404 U.S. 1048 (1972)). Further, the court suggested that the proper procedure when faced with voluminous records as in this case was to seal and hold the documents pending a magistrate's approval of a further search. *Id.* at 595-96. See MODEL CODE OF PRE-ARREST PROCEDURE § 220.5 (1975).

382. 694 F.2d at 595-97 (quoting *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980)). In *Abrams*, officers seized all of the Medicare and Medicaid records of doctors suspected of Medicare fraud, conspiracy and mail fraud. The warrant specified "certain property, namely evidence of a crime, to wit, certain business and billing and medical records of patients of Doctors . . . which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States . . ." 615 F.2d at 542. The court in *Abrams* discussed the origin of the particularity requirement, noting that "[t]he general warrant and the unrestricted search that follows have been condemned by Americans since Colonial days." *Id.* at 543 (citing *Marron v. United States*, 275 U.S. 192, 195 (1927)).

An expression of the Supreme Court's concern over the danger of general warrants in the context of a business records search is shown in *Andresen v. Maryland*, 427 U.S. 463 (1976) where the Court stated:

In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized . . . [R]esponsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

Id. at 482 n.11.

Nevertheless, the court upheld the admission of the documents seized.³⁸³ In support of this seemingly anomalous decision,³⁸⁴ the court determined that the improper seizure was motivated by practical considerations rather than "a desire to engage in indiscriminate 'fishing.'"³⁸⁵ The court also rejected the contention that the officers' behavior was so unconscionable as to constitute a due process violation.³⁸⁶

In *United States v. Issacs*,³⁸⁷ the Ninth Circuit upheld the seizure of a journal containing records of drug transactions while executing a search warrant pertaining only to rent receipts and counterfeit Federal Reserve notes.³⁸⁸ While executing the warrant, Secret Service agents discovered a locked safe in the defendant's closet. Issacs gave them the combination, and the agents opened the safe, discovering six journals. While leafing through one of the journals to see if it contained receipts or notes, an agent noticed notations appearing to record drug transactions. Although he found no such notations in the other journals, the

383. 694 F.2d at 597. The Ninth Circuit relied on the general rule that the seizure of evidence not described in the warrant along with evidence which is described in the warrant does not require suppression of the latter. *Id.* (citing *United States v. Daniels*, 549 F.2d 665, 668 (9th Cir. 1977)).

384. *Id.* (citing *United States v. Daniels*, 549 F.2d 665, 668 (9th Cir. 1977)). The court in *Daniels* admitted into evidence drugs seized in the search of a home, but excluded letters also found in the search because they were outside the scope of the warrant. The court held that the letters were not "'products' of illegal seizures." *United States v. Daniels*, 549 F.2d 665, 668 (9th Cir. 1977). This reasoning is an application of the "fruits of the poisonous tree" doctrine. In *Tamura*, it seems that the records used against the defendant were "products" of the illegal wholesale seizure of the company's records. Therefore, the *Tamura* court's use of *Daniels* is highly questionable in this factual context.

385. 694 F.2d at 597. To illustrate the circumstance in which a warrant would be overturned as a general warrant, the court cited two cases for comparison. In *United States v. Rettig*, 589 F.2d 418 (9th Cir. 1978), officers had used a warrant authorizing a search for marijuana and related materials, to conduct an extensive search for evidence of a cocaine importing conspiracy. The court found that the officers had "substantially exceeded any reasonable interpretation of [the warrant's] provisions." *Id.* at 423.

In *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982), FBI agents conducted a massive search of defendant's offices pursuant to a warrant with a lengthy affidavit containing 162 descriptions of property subject to seizure. The court upheld the search even though some items incidentally seized were outside the scope of the warrant. *Id.* at 1259-60.

386. 694 F.2d at 597. The Supreme Court has held that evidence obtained by police conduct which is "shocking to the universal sense of justice" must be suppressed under the "fundamental fairness component" of the fifth amendment. *See Rochin v. California*, 342 U.S. 165 (1952) (evidence obtained by forcible use of stomach pump excluded); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980) (offer of five dollars to suspect's five-year-old son to discover location of heroin held not to violate due process).

387. 708 F.2d 1365 (9th Cir.), *cert. denied*, 104 S. Ct. 165 (1983).

388. *Id.* at 1336. While searching Issacs' apartment pursuant to the warrant, agents discovered drugs, drug paraphernalia, weapons and ammunition.

agent confiscated all six. At trial, the court admitted the journal containing records of drug transactions, but suppressed the other five journals.³⁸⁹

On appeal, Issacs claimed that the plain view doctrine did not apply to the seizure of the journal because the agent had to read the contents in order to understand that the journal was incriminating.³⁹⁰ The Ninth Circuit disagreed and held that the seizure of the journal was permissible under the plain view exception to the warrant requirement.³⁹¹ In searching this holding, the court followed *Coolidge v. New Hampshire*,³⁹² in which the Supreme Court held that officers may seize evidence, not described in the warrant but found in plain view during a legal search if: (1) the discovery was inadvertent; and (2) it was immediately apparent to the officer that the object was evidence of a crime.³⁹³

The *Issacs* court held that the agent's discovery of the notations in the journal had met the criteria established in *Coolidge* and thus, the journal had properly been introduced into evidence.³⁹⁴ The Ninth Circuit distinguished its holding in *United States v. Wright*,³⁹⁵ because the agent in *Issacs*, unlike the agent in *Wright*, had discovered the incriminating notations during his initial perusal of the journal.³⁹⁶

The seizure of evidence of a crime, as distinguished from its fruits or instrumentalities, or of contraband, requires an additional showing

389. At the defendant's first trial, which ended in a mistrial, five of the journals were excluded. At the second trial, all six journals were admitted for impeachment purposes. *Id.* Issacs was found guilty of possession with intent to distribute cocaine and methaqualone in violation of 21 U.S.C. § 841(a)(1) (1976).

390. 708 F.2d at 1368.

391. *Id.* at 1369.

392. 403 U.S. 443, 469 (1971).

393. 708 F.2d at 1368. Although the Ninth Circuit used the rule in *Coolidge* to resolve this case, it noted that, in fact, the requirements of the *Coolidge* rule had been redefined in *Texas v. Brown*, 103 S. Ct. 1535 (1983). In *Brown*, the Court's plurality opinion questioned both the "inadvertance" and "immediately apparent" requirements stated in *Coolidge*. "Plain view" is perhaps better understood, therefore, not as an independent 'exception' to the warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." 103 S. Ct. at 1540-41.

394. 708 F.2d at 1370.

395. 667 F.2d 793, 799 (9th Cir. 1982). In *Wright*, an officer had discovered a ledger during a search pursuant to a warrant authorizing seizure of a California driver's license. After leafing through the ledger and discovering nothing incriminating inside, the officer brought it to another investigator who discovered that narcotics transactions had been recorded in the ledger. *Id.* at 795. The Ninth Circuit found that the incriminating nature of the ledger was not "immediately apparent," and held that its seizure and perusal was illegal. *Id.*

396. 708 F.2d at 1369-70.

by the warrant applicant that a "nexus" exists between the evidence and the criminal behavior.³⁹⁷

In *United States v. Rubio*,³⁹⁸ the defendants contended that the seizure from their homes of indicia of membership in an alleged Racketeer Influenced Corrupt Organization (RICO) was done without probable cause.³⁹⁹ Subsequent to the indictment of six members of the Hell's Angels Motorcycle Club for racketeering, federal law enforcement agents obtained warrants to search each member's home.⁴⁰⁰ In each supporting affidavit, the agents described in detail the types of indicia of membership customarily kept by members of the Hell's Angels, enumerated facts indicating that the defendants were members, and stated that each defendant had been indicted by a federal grand jury for membership in a RICO enterprise.⁴⁰¹

In holding that the evidence seized should have been suppressed, the Ninth Circuit first recalled the Supreme Court's rejection of the "mere evidence rule" in *Warden v. Hayden*.⁴⁰² Under *Hayden*, evidence of a crime is seizable if there is probable cause to believe that the items to be seized will aid in a particular criminal investigation.⁴⁰³ In

397. See *Warden v. Hayden*, 387 U.S. 294 (1967). In *Hayden*, the Supreme Court rejected the "mere evidence rule" under which evidence of a crime not subject to government seizure was not subject to a search warrant. See *Gouled v. United States*, 255 U.S. 298 (1921) (notion that the fourth amendment protection against search and seizure protected only property interests has been gradually replaced with the idea that the amendment exists primarily to protect privacy); *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963) (intangible property protected under fourth amendment); *Jones v. United States*, 362 U.S. 257, 266 (1960) (subtle distinctions under property law not determinative of whether party is "person aggrieved by an unlawful search and seizure"); *Henry v. United States*, 361 U.S. 98, 103-04 (1959) (stolen goods in which defendant has no property right protected under fourth amendment). The Court in *Hayden* held that, in order for "mere evidence" to be subject to seizure, "[t]here must be . . . a 'nexus'—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior." 387 U.S. at 306-07.

398. 727 F.2d 786 (9th Cir. 1983).

399. *Id.* at 791.

400. *Id.* at 790.

401. *Id.* at 794. Defendants were subsequently convicted under the RICO statute which makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (1976). During the execution of the warrants, agents recovered substantial additional evidence of criminal activity not described in the warrant but found in plain view. Although the warrant was based upon the alleged RICO offenses, all defendants except Rubio were convicted only of those additional charges added as a result of this evidence obtained under the plain view exception to the warrant requirement. 727 F.2d at 791.

402. 387 U.S. 294 (1967).

403. *Id.* at 307.

Rubio, nearly all of the objects described in the warrant were "mere evidence."⁴⁰⁴

The crime for which the defendants were under investigation prohibits participation in a corrupt organization "through a pattern of racketeering activity."⁴⁰⁵ Therefore, in order to establish probable cause, the affiants must establish a nexus between the indicia of membership in the club and the club's illegal activities. Otherwise, reasoned the court, members innocently associated with such an organization would be subject to search simply because other members were engaged in illegal activity.⁴⁰⁶ The Ninth Circuit held that no such nexus existed in this case because there were no facts alleged in the affidavits showing that the suspects had engaged in racketeering activities through their connection with the Hell's Angels.⁴⁰⁷ Further, the mere assertion that the suspects had been indicted under the RICO statute was held insufficient to support a finding of probable cause.⁴⁰⁸ Although an indictment from a properly constituted grand jury conclusively establishes probable cause for an arrest, such an indictment does not establish probable cause for a search without an independent judicial determination.⁴⁰⁹

C. Warrantless Searches

Generally, warrantless searches are unreasonable under the fourth amendment. Although a search pursuant to a warrant is preferred, the courts have recognized various exceptions to the warrant requirement. This section sets forth those exceptions.

404. *Id.*

405. *Id.*

406. 703 F.2d at 1129. The court concurred with the Second Circuit's conclusion in *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), which held that a violation of the RICO statute occurs when (1) the defendant is only able to commit the predicate criminal offense through involvement in the organization; or (2) where the predicate offense is "related to activities of that enterprise." *Id.* at 54. Simply committing the predicated offense would not be sufficient to violate the RICO statute. *Id.* Similarly, the Ninth Circuit reasoned, mere association with the allegedly corrupt enterprise would not be enough to support a warrant without a further showing that the evidence to be seized was related in some way to that organization's criminal activities. 703 F.2d at 1130.

407. *Id.*

408. *Id.* at 1130-31. The court cited *United States v. Cheshire*, 678 F.2d 1353 (9th Cir. 1982), a case stemming from the same indictment as *Rubio*. In *Cheshire*, the Ninth Circuit found that a six-year-old affidavit substantially identical to the ones in *Rubio* alleged insufficient facts to show probable cause to believe that the defendant was presently a member of the Hell's Angels.

409. 703 F.2d at 1130-31 (quoting *Gerstein v. Pugh*, 420 U.S. 103 (1973)).

1. Exigent circumstances

An exception to the search warrant requirement may result from the presence of exigent circumstances.⁴¹⁰ A warrantless search pursuant to the exigent circumstances exception is justified by a reasonable belief that evidence would be destroyed or removed while a warrant was being sought.⁴¹¹

In *United States v. Martin*,⁴¹² the Ninth Circuit held that a warrant was necessary to examine a sealed bag. The court ruled that no exigent circumstances existed because the bag was in exclusive police custody.⁴¹³ Martin had invited Garcia, an undercover Drug Enforcement Administration (DEA) agent, to purchase cocaine at Martin's house. Garcia saw Martin place the cocaine into a locked bank bag and put it in a desk drawer in Martin's bedroom. Garcia subsequently went outside to meet another agent on the pretext of meeting her friend with the money. When she returned, Garcia arrested Martin in the hallway. Garcia went into the bedroom, opened the desk drawer, and removed the locked bag. The key was obtained from Martin and used to open and search the bag.⁴¹⁴

The court determined that no exigent circumstances existed because the bag was in police custody, and its contents were not subject to removal or destruction by Martin.⁴¹⁵ Because the Ninth Circuit ruled that a valid search of the bag's contents required a warrant, it did not reach the issue of whether the seizure of the bag itself was legal.⁴¹⁶

Finally, the court distinguished the cases upon which the government relied as not addressing the warrantless search of a closed container in police custody.⁴¹⁷ In fact, the cases relied upon by the

410. See, e.g., *Steagald v. United States*, 451 U.S. 204, 215-16 (1981) (warrantless search without exigent circumstances violated fourth amendment).

411. *United States v. McLaughlin*, 525 F.2d 517, 520-21 (9th Cir. 1975) (entry into residence to protect contraband from destruction).

412. 693 F.2d 77 (9th Cir. 1982) (per curiam), *cert. denied*, 104 S. Ct. 1602 (1984).

413. *Id.* at 78.

414. *Id.* at 77-78. Officer Garcia admitted that nothing had prevented the police from obtaining the required warrant. *Id.* at 78.

415. *Id.* at 78 (citing *United States v. Chadwick*, 433 U.S. 1 (1977)). In *Chadwick*, the Court ruled that a search warrant was required before federal agents could open a locked footlocker, even though it was properly in their possession and they had probable cause to believe it contained contraband. *United States v. Chadwick*, 433 U.S. 1, 11 (1977). The Court reasoned that there was no exigency because the agents had exclusive control of the footlocker following its seizure. There was no danger that the footlocker could be removed before a warrant was secured. Therefore, a search warrant was required. *Id.* at 13.

416. 693 F.2d at 78.

417. *Id.* The cases cited by the government were *United States v. Johnson*, 561 F.2d 832 (D.C. Cir.), *cert. denied*, 432 U.S. 907 (1977), and *United States v. Ortiz*, 603 F.2d 76 (9th

government involved interpretation of the plain view doctrine.

In a dissent, Judge Goodwin argued that Martin packed the bag in front of Garcia, and therefore could have no reasonable expectation of privacy in its contents, at least as to Garcia.⁴¹⁸ Although the dissent recognized the argument that a ten to twenty minute lapse could extinguish "plain view," and thereby restore Martin's expectation of privacy, it concluded that the passage of time in the present case was not significant enough to create a new expectation of privacy.⁴¹⁹

In *United States v. Chase*,⁴²⁰ the Ninth Circuit upheld a warrantless search based upon exigent circumstances where the defendant could have been warned of police presence due to the allegedly illegal detention of a third party.⁴²¹ Narcotics Task Force (NTF) agents set up a sale of cocaine from Chase. After the transaction occurred, a search warrant was sought. In the meantime, a woman leaving Chase's

Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980). In *Johnson*, several officers observed narcotics being prepared for distribution, but did not immediately arrest or search the defendants. Instead, the officers returned to the police station for reinforcements and to determine whether a search warrant was required. Although the officers did not continue their surveillance during this half-hour delay, the court upheld the subsequent warrantless search based upon exigent circumstances. The court determined that the delay did not destroy the existence of probable cause any more than if there had been a longer wait for a warrant. 561 F.2d at 842. The court stated that when the police observe a crime in progress with contraband in plain view, they are fully authorized both to make arrests and to seek out the contraband. *Id.* at 844-45.

In *Ortiz*, a police officer observed the defendants sitting at a table inside a service station. A jar containing folded papers was on the table. The officer, convinced that a drug transaction was taking place, approached the defendants and identified himself. Defendant Canales grabbed the jar and hid it while the officer chased another defendant. Canales was subsequently arrested by the officer. During a warrantless search of the service station, the officer discovered the jar containing heroin under a couch in the back room. The court upheld this search since the officer had legally observed the heroin. The plain view exception was not destroyed when Canales grabbed the jar containing the heroin and ran from the front part of the service station. 603 F.2d at 79.

418. 693 F.2d at 78 (Goodwin, J., dissenting). The dissent argued that the facts in this case were distinguishable from those in *Chadwick*. In *Chadwick*, the defendant's privacy was invaded when the luggage he had packed in privacy was searched without a warrant. The Court found that by placing personal effects inside a locked footlocker, the defendant manifested an expectation that the contents would be free from public examination. *United States v. Chadwick*, 433 U.S. 1, 11 (1977). In the present case, Martin openly allowed Garcia to observe him pack the cocaine in the bag and place it into the drawer. 693 F.2d at 78 (Goodwin, J., dissenting).

419. 693 F.2d at 78 (Goodwin, J., dissenting). The dissent argued that this was "essentially a unitary transaction The officer came, she saw, she went out to get 'the money' which turned out to be reinforcements, and she returned and retrieved what she had just seen This transaction invaded no privacy that Martin had not voluntarily relinquished when he dealt with Garcia." *Id.* (Goodwin, J., dissenting).

420. 692 F.2d 69 (9th Cir. 1982) (per curiam).

421. *Id.* at 71.

residence was detained on the pretext of a stolen automobile investigation. A search during this detention revealed no cocaine or weapons. The woman's attorney stopped at the detention site, then left. The NTF agents, fearful that Chase would soon learn of the detention, entered and secured the residence until the search warrant was obtained.⁴²² Chase moved to suppress the evidence obtained from this search, including cocaine and a pistol, on the theory that, through the illegal detention of the woman, the agents created the exigency that justified the entry into his home.⁴²³

Because the district court's finding of exigent circumstances was not clearly erroneous, the judgment was affirmed.⁴²⁴ The court ruled that the woman's attorney's knowledge of the detention was sufficient to support a reasonable belief by the NTF agents that Chase would be alerted to their presence.⁴²⁵

In *United States v. Lomas*,⁴²⁶ the Ninth Circuit held that in the absence of exigent circumstances, the warrantless entry of a hotel room to determine whether it was occupied was illegal.⁴²⁷ During a DEA undercover operation, a search of defendant Margolis revealed a receipt for a local hotel room where earlier narcotics-related activities had taken place. A DEA agent and a local deputy entered the room to check for occupants. The procedure took thirty seconds and they did not notice any incriminating evidence. The room was then secured to prevent the destruction of evidence while awaiting a search warrant.⁴²⁸ The court held that the warrantless entry to conduct "even the most cursory search" was illegal in the absence of exigent circumstances.⁴²⁹

422. *Id.* at 70.

423. *Id.* Chase based his argument on *United States v. Allard*, 634 F.2d 1182 (9th Cir. 1980). However, the court distinguished *Allard*, reasoning that the exigent circumstances in *Allard* were created by conduct that violated the defendant's own constitutional rights, and not those of a third party. 692 F.2d at 70.

424. 692 F.2d at 71 (citing *United States v. Flickinger*, 573 F.2d 1349 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978), *overruled on other grounds*, *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984)).

425. *Id.*

426. 706 F.2d 886 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 720 (1984). The defendants were convicted for conspiring to possess with intent to distribute cocaine, pursuant to 21 U.S.C. §§ 841(a)(1), 846 (1976). 706 F.2d at 888.

427. 706 F.2d at 893.

428. *Id.* at 888-90.

429. *Id.* at 893. See *Vale v. Louisiana*, 399 U.S. 30 (1970). In *Vale*, after officers determined that they had observed a narcotics sale, they arrested the defendant on the front steps of his house. One officer made a cursory inspection of the entire house to determine whether anyone else was present. The Court held the search invalid because of the lack of exigent circumstances or any other exception to the warrant requirement. *Id.* at 34-35.

Nonetheless, Margolis' conviction was affirmed because the court determined that the other evidence against him rendered the "admission of this evidence harmless beyond a reasonable doubt."⁴³⁰

In *United States v. Spetz*,⁴³¹ the Ninth Circuit held that a warrantless protective search of a house for additional suspects following the arrest of five suspects in the driveway was illegal.⁴³² DEA agents had followed the delivery of 1440 pounds of marijuana to a private residence. During the protective sweep subsequent to the arrest of five suspects, the agents discovered a set of scales, approximately \$10,000 in currency, narcotics, and drug paraphernalia. These observations were included in an affidavit supporting the issuance of a search warrant for the residence.⁴³³

The Ninth Circuit observed that the exigent circumstances exception may justify a protective search when officers conduct an arrest in or near a residence, and the officers reasonably believe that there might be other persons on the premises who could be dangerous to them.⁴³⁴ The district court concluded that there were exigent circumstances which justified the warrantless protective search.⁴³⁵ In reviewing the district court's decision, the Ninth Circuit noted that in order to justify a warrantless search, the government must " " "point to specific and ar-

430. 706 F.2d at 894. Lomas' conviction was reversed and the case was remanded to allow the district court to determine whether he had a legitimate expectation of privacy in the hotel room. The court stated that if such an expectation is found to have existed, the trial court must then decide whether the evidence could have been obtained through some independent source. *Id.* at 894-95. The court did not decide whether there was sufficient evidence to find Lomas guilty beyond a reasonable doubt if the items seized in the hotel room were not admitted. *Id.* at 895.

431. 721 F.2d 1457 (9th Cir. 1983).

432. *Id.* at 1467.

433. *Id.* at 1461-62, 1465. Defendants Kalik and Spetz sought to suppress the evidence uncovered during the search pursuant to the warrant on the grounds that the warrant was partially supported by observations made during the allegedly unlawful protective sweep. *Id.* at 1465. The Ninth Circuit held that the protective sweep was illegal, but it ruled that independent probable cause existed to support the issuance of the search warrant. *Id.* at 1467-68.

434. *Id.* at 1465 (citing *United States v. Gardner*, 627 F.2d 906, 909-10 (9th Cir. 1980) (protective search upheld where weapons were observed on premises and persons could enter residence without detection by police)).

435. *Id.* at 1466. In finding exigent circumstances, the district court stated:

[T]here were five men and five automobiles at a house that was away from the beaten path, up by itself. None of these agents knew how many people were there, but with five cars there, they could assume that there were several. The doors were open. If I were one of those agents, I'd jolly well want to know who else is in that house, if anybody, and under the circumstances I think the agents were justified in making [a protective search].

Id.

articulable facts which, taken together with rational inferences from those facts, [would] reasonably warrant [the warrantless] intrusion." "436

The Ninth Circuit held that the government failed to show specific and articulable facts justifying the finding of exigent circumstances.⁴³⁷ Nothing in the record indicated that the suspects arrested in the driveway were armed or that there were weapons in the house.⁴³⁸ The court noted that the present case dealt "only with a crime of marijuana smuggling."⁴³⁹ The court stated that mere speculation about the circumstances surrounding the warrantless search cannot support a finding of exigent circumstances.⁴⁴⁰

Finally, the court noted that there is always a risk that persons inhabiting a residence will be armed. However, if officers conducting an arrest or a search could use this risk to justify a warrantless search, there would never be a need for a warrant because every arrest or

436. *Id.* (quoting *United States v. Dugger*, 603 F.2d 97, 99 (9th Cir. 1979) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968))). The *Spetz* court did not decide whether the warrantless search would have been valid had the purpose been to prevent destruction of evidence. 721 F.2d at 1466 n.18. Compare *United States v. Kunkler*, 679 F.2d 187, 191-92 (9th Cir. 1982) (court upheld warrantless search and seizure pursuant to exigent circumstances exception where destruction of evidence was likely) with *United States v. Basurto*, 497 F.2d 781, 789-90 (9th Cir. 1974) (court held invalid a protective search for additional armed suspects inside a house). The *Spetz* court stated that the record clearly indicated that preservation of evidence was not the purpose of the protective sweep. 721 F.2d at 1466 n.18.

437. 721 F.2d at 1466.

438. *Id.* at 1467. See *Basurto*, 497 F.2d at 789. In *Basurto*, after the defendant was arrested for marijuana importation and distribution, he yelled toward the house, "It's the police." The court did not believe that this statement or the fact that the defendant had previously possessed a weapon "provided any indication . . . that there was anyone in the house who might harm them or that weapons were in the house." *Id.*

The *Spetz* court distinguished *United States v. Gardner*, 627 F.2d 906 (9th Cir. 1980), where the court upheld a protective search. In *Gardner*, it was possible for someone to enter the residence undetected by the surveillance team outside. Also, an undercover agent had observed weapons in the house prior to the arrests. *Id.* at 911-12 n.6. In *Spetz*, there were no known confederates of the individuals arrested, and the agents were presumably able to watch all of the house's entrances and exits. Furthermore, the agents "knew of no weapons connected with any of the individuals arrested or the residence," nor had there been any other articulable basis for concluding that a risk of violence existed. 721 F.2d at 1467.

439. 721 F.2d at 1466-67. See also *United States v. Flickinger*, 573 F.2d 1349 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978), *overruled on other grounds*, *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984). In *Flickinger*, the court noted that the exigent circumstances exception is justified where the suspect is arrested for a crime of violence. However, the court stated that marijuana smuggling is not necessarily a crime of violence and there was no evidence of violence in that case. Furthermore, there was no evidence that any of the occupants of the house possessed weapons. *Id.* at 1355.

440. 721 F.2d at 1466 (citing *United States v. Hoffman*, 607 F.2d 280, 283-84 (9th Cir. 1979) (no exigent circumstances where trailer was entered after fire inside had been extinguished)).

search involves the potential use of weapons.⁴⁴¹ The court therefore held that the protective sweep of the residence without a warrant was unlawful.⁴⁴²

The Ninth Circuit stringently applies the exigent circumstances exception. *United States v. Chase*⁴⁴³ was the only case during the survey period in which the court upheld a warrantless intrusion on the basis of exigent circumstances. This suggests that the trend in the Ninth Circuit is to strictly construe the requirement of a reasonable, articulable belief that exigent circumstances justify the warrantless intrusion.

2. Search incident to arrest

When an arrest is made, it is reasonable to search the suspect and the area "within his immediate control" for weapons or evidence that could be concealed or destroyed.⁴⁴⁴ In *United States v. Harvey*,⁴⁴⁵ the Ninth Circuit held that, in order to be admissible, evidence produced by a blood sample, taken without consent or warrant, requires a prior formal arrest or an arrest substantially contemporaneous to the taking of the blood sample.⁴⁴⁶ However, an exception to the arrest requirement exists if the defendant was so incapacitated that he or she could not have comprehended the significance of an arrest.⁴⁴⁷ In a consolidated appeal, defendants Harvey and Chase contested their convictions for involuntary manslaughter which arose from alcohol-related traffic accidents. The court held that Harvey should have been arrested prior to the taking of a blood sample, and therefore reversed her conviction.⁴⁴⁸ As to Chase, however, the court held that he was so incapacitated that a prior arrest was unnecessary in order to take an unconsented blood sample, and therefore affirmed his conviction.⁴⁴⁹

Harvey was driving a truck which crossed the center line and hit a van, killing the driver. Three and one-half hours after the accident, Harvey was asked to consent to a blood sample, without being arrested. She vehemently refused, but the blood sample was taken over her ob-

441. *Id.* at 1467 (citing *Flickinger*, 573 F.2d at 1355).

442. *Id.* See *supra* note 433.

443. 692 F.2d 69 (9th Cir. 1982) (per curiam).

444. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

445. 701 F.2d 800 (9th Cir. 1983).

446. *Id.* at 804-05.

447. *Id.* at 805-06. For a discussion of the justifications of this exception, see *infra* note 458.

448. 701 F.2d at 805.

449. *Id.* at 805-07.

jections. The blood sample was tested and showed .19% alcohol.⁴⁵⁰

Chase was driving a car which struck a bridge abutment, killing his passenger, and severely injuring himself. The trial court determined that at the time the officer requested the blood sample, Chase was so delirious that it was unnecessary for the officer to have arrested him prior to the taking of the blood sample. The blood test revealed an alcohol content of .21%.⁴⁵¹

Harvey and Chase argued on appeal that the blood test results should have been suppressed because neither defendant had been formally arrested when the blood samples were taken.⁴⁵² The court recognized that a police officer may obtain a blood sample for analysis without a warrant, pursuant to the search incident to arrest exception.⁴⁵³ However, such an arrest must precede, or be substantially contemporaneous with, the search incident to the arrest.⁴⁵⁴

In the present cases, the arrests did not occur until four months

450. *Id.* at 802. Harvey was not formally charged until four months later. *Id.*

451. *Id.* at 802-03. Chase was indicted four months later. *Id.* at 803.

452. *Id.* at 802.

453. *Id.* at 803 (citing *Schmerber v. California*, 384 U.S. 757, 770-71 (1966)). In *Schmerber*, the Supreme Court held that a police officer who had validly arrested a suspect may obtain a blood sample for an alcohol test without a warrant. Unlike the defendant in *Schmerber*, however, neither Harvey nor Chase were formally arrested prior to the taking of the blood samples. *Id.*

The *Schmerber* Court decided that the evanescent nature of blood alcohol levels makes the requirement of a warrant highly impractical. However, because the taking of a blood sample is a substantial intrusion, a warrantless seizure of blood is permissible only in connection with a search incident to arrest. 384 U.S. at 770-72.

The Ninth Circuit distinguished *Cupp v. Murphy*, 412 U.S. 291 (1973), where the Supreme Court upheld the warrantless taking of fingernail scrapings without a formal arrest based upon the existence of probable cause to seize and arrest the defendant. *Id.* at 294-96. The Ninth Circuit noted that the *Murphy* Court "seemingly equating Murphy's seizure with an arrest, . . . rationalized the taking of fingernail scrapings as a limited and reasonable method to preserve evanescent evidence." 701 F.2d at 804. The *Murphy* Court allowed this search since it was a "very limited intrusion." 412 U.S. at 296. The Ninth Circuit did not find *Murphy* controlling "because it involved a much less intrusive search than the extraction of a blood sample." 701 F.2d at 804.

The Ninth Circuit noted that the Supreme Court has cited *Murphy* in support of a search which is substantially contemporaneous with the arrest. *Id.* (citing *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980)). There are similar holdings in the Ninth Circuit. *See United States v. Chatham*, 573 F.2d 565, 567 (9th Cir. 1977) (per curiam) ("As long as probable cause to arrest exists before the search, a search substantially contemporaneous with the arrest is incident thereto."); *Dickey v. United States*, 332 F.2d 773, 778 (9th Cir.) (upheld warrantless seizure prior to arrest where probable cause to arrest existed at time of seizure and arrest was made immediately after seizure), *cert. denied*, 379 U.S. 948 (1964).

454. 701 F.2d at 804 (citing *United States v. Chatham*, 573 F.2d 565, 567 (9th Cir. 1977); *Cipres v. United States*, 343 F.2d 95, 98 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966)). In *Cipres*, the court stated that "a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the

after the blood samples were taken.⁴⁵⁵ In light of this, the court reversed Harvey's conviction, concluding that an arrest must precede or be substantially contemporaneous with the taking of a blood sample.⁴⁵⁶

The Ninth Circuit also ruled that Chase was so incapacitated that it was unnecessary to arrest him prior to taking a blood sample.⁴⁵⁷ It found no compelling reason to determine that a prior arrest is necessary when it is shown that the suspect could not have understood the significance of an arrest.⁴⁵⁸

In *United States v. Thornton*,⁴⁵⁹ the Ninth Circuit upheld a warrantless search incident to arrest.⁴⁶⁰ A police officer received a radio message about a parked vehicle partially in the traffic lane with its lights on. The officer approached the vehicle and observed Thornton in the car, apparently asleep or unconscious. Eight inches of an altered

arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure." *Cipres v. United States*, 343 F.2d at 98.

455. 701 F.2d at 804. See *supra* notes 450 & 451.

456. 701 F.2d at 805. The Ninth Circuit also cited as authority for its conclusion *Holland v. Parker*, 354 F. Supp. 196 (D.S.D. 1973) (arrest required prior to requesting motorist to submit to blood test). *Accord* *Layland v. State*, 535 P.2d 1043 (Alaska 1975), *overruled on other grounds*, *Anchorage v. Gober*, 592 P.2d 1187, 1191-92 n.8 (Alaska 1979); *People v. Superior Court*, 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972); *State v. Richerson*, 87 N.M. 437, 535 P.2d 644, *cert. denied*, 87 N.M. 450, 535 P.2d 657 (1975). But see *Devaney v. State*, 259 Ind. 483, 288 N.E.2d 732 (1972) (prior arrest not required; exigent circumstances exception is sufficient to uphold blood sample based upon the court's reading of *Schmerber*); *accord* *State v. McMaster*, 118 N.J. Super. 476, 288 A.2d 583 (1972).

457. 701 F.2d at 805-06. See *Breithaupt v. Abram*, 352 U.S. 432 (1957), where the Supreme Court upheld extraction of a blood sample taken while the defendant was lying unconscious in the hospital. The defendant had been involved in an automobile accident, an almost-empty pint whiskey bottle was found in his glove compartment, and the smell of liquor was detected on his breath. 352 U.S. at 433.

458. 701 F.2d at 805-06. The court recommended the following procedure to determine whether the suspect's level of incapacity renders a prior arrest unnecessary. The officer should first request the suspect's consent to take a blood sample. If the suspect refuses, he or she should be arrested prior to taking the blood sample. The arrest and the removal of the blood must be supported by probable cause. If the officer's request is not refused, and the suspect is not in a lucid condition, a formal arrest is not required if the seizure of the person and the blood is supported by probable cause. *Id.* at 806.

The court observed that requiring a prior formal arrest not only aids in preventing officers from arbitrarily violating a suspect's privacy rights, but also triggers other rights which are granted to the accused at the time of the arrest. Arguably, the significance of these rights would not be appreciated where the suspect is in an incapacitated state. However, the court also maintained that another justification for a prior arrest is that it would demarcate the point at which the officer determined that probable cause to arrest existed. Thus, the court found that this would "help prevent an after-the-fact justification of the seizure of the suspect and the blood." *Id.* at 805. By not requiring a prior arrest where the suspect is incapacitated, the court seems to obviate the importance of this later justification.

459. 710 F.2d 513 (9th Cir. 1983).

460. *Id.* at 515.

gun stock was visible under the front seat, next to Thornton's leg. A registration check revealed that the car was registered to a woman. Thornton was arrested on charges of carrying a concealed weapon within city limits. A pat-down search revealed five shotgun slugs, which were seized. The officer also removed the shotgun from under the seat.⁴⁶¹

The defendant moved to suppress the use of the gun as evidence.⁴⁶² The court held that the seizure of the gun resulted from a valid search incident to arrest,⁴⁶³ and therefore affirmed Thornton's conviction.⁴⁶⁴

3. Stop-and-frisk searches

Another exception to the fourth amendment requirement for a warrant prior to a search is the "stop-and-frisk" or "pat-down" search.⁴⁶⁵ When a police officer reasonably concludes that a suspect may be involved in criminal activity and may be armed and presently dangerous, the officer may conduct a carefully limited search of the suspect to discover weapons.⁴⁶⁶

In *United States v. Prim*,⁴⁶⁷ the Ninth Circuit held that a pat-down search is illegal when its purpose is to uncover narcotics rather than weapons.⁴⁶⁸ The defendant purchased a one-way ticket to Hawaii at the Portland International Airport. Two police officers became suspicious because of the defendant's nervous movements. A DEA agent was summoned, and the defendant was observed until his flight left. After his departure, it was discovered that he was mentioned in a 1979

461. *Id.* at 514-15. Thornton was indicted for possessing a firearm without a serial number and possessing an unregistered firearm in violation of 26 U.S.C. §§ 5861(d), (i) (1982).

462. Thornton argued that there had not been probable cause to arrest him because: (1) the gun stock was visible, therefore the weapon was not concealed; and (2) no specific evidence existed to show that Thornton was not entitled to possess the gun. 710 F.2d at 515.

463. *Id.* (citing *New York v. Belton*, 453 U.S. 454, 460-61 (1981) (Court upheld warrantless search of passenger compartment incident to the arrest of the car's occupant)).

464. The Ninth Circuit determined that the district court's finding of probable cause to arrest the defendant for violating the concealed weapons statute was not clearly erroneous. 710 F.2d at 515. The district court had ruled that the gun was concealed even though the stock was visible because the stock could be detached from the rest of the gun. The lower court had further concluded that the officer's view of the stock justified his belief that a concealed gun existed. The Ninth Circuit also determined that the officer's absence of specific evidence to show that Thornton was not entitled to possess the gun was irrelevant. *Id.*

465. This exception was first delineated in *Terry v. Ohio*, 392 U.S. 1 (1968).

466. *Id.* at 30.

467. 698 F.2d 972 (9th Cir. 1983).

468. *Id.* at 977.

narcotics investigation, and that an outstanding nonsupport warrant for the defendant existed. Authorities in Honolulu were notified of this information. After arriving in Hawaii, the defendant was followed, but he made no unusual or suspicious actions. He was then approached by government agents, who examined his identification and plane ticket. The officers informed the defendant of their suspicion that he was trafficking in narcotics, and asked him to accompany them to an office. No mention was made of the outstanding nonsupport warrant, nor was any search for weapons conducted.⁴⁶⁹ In the interrogation room, the defendant refused to consent to a search and requested a lawyer. Agent Snyder conducted a pat-down search which uncovered an opaque envelope which had made a bulge in the defendant's pocket. The envelope was later found to contain cocaine.⁴⁷⁰

The court stated that the purpose of a pat-down search is "to allow the officer to pursue his investigation without fear of violence."⁴⁷¹ Therefore, the search is limited to an inspection reasonably designed to discover hidden instruments for assault.⁴⁷² In this case, Agent Snyder used the pat-down as a ruse since he in fact expected to find narcotics as the source of the bulge.⁴⁷³ The court therefore concluded that the

469. *Id.* at 973-74. The officers later testified that the reason the defendant was brought to the interrogation room was not because of the outstanding nonsupport warrant, but to question the defendant about narcotics and to obtain his consent to a search. *Id.* at 974.

470. *Id.* Prior to the pat-down search, Agent Snyder directed the defendant to place his personal belongings on the table. The defendant did so, but did not remove the envelope from his pants. After the pat-down search, Snyder placed the envelope on the table with the defendant's other personal items. Snyder testified that the defendant asked for a cigarette from his briefcase. After removing a cigarette, Snyder placed the envelope and the other personal items inside the briefcase. The defendant testified that he does not smoke and did not request a cigarette. Snyder left the room with the briefcase, which was then examined by narcotics-detecting dogs. *Id.* at 974-75. The court declined to discuss the issue of whether the use of the dogs was an illegal search since it held that the detention and pat-down search were unlawful. *Id.* at 977-78.

471. *Id.* at 977 (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)). The *Adams* Court asserted that:

"When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," he may conduct a limited protective search for concealed weapons. [citation omitted] The purpose of this limited search is not to discover evidence of crime

Adams v. Williams, 407 U.S. 143, 146 (1972) (quoting *Terry v. Ohio*, 392 U.S. 1, 24 (1968)).

472. See *Tinney v. Wilson*, 408 F.2d 912, 916 (9th Cir. 1969) (officer's squeezing of small object which he realized was not a potential weapon, but might be narcotics, went beyond a lawful search).

473. 698 F.2d at 977. The court reached this conclusion because the defendant passed through a magnetometer, was under constant surveillance at both airports, and the officers who asked the defendant to the interrogation room did not conduct a pat-down search. The officers testified that nothing about the defendant's behavior indicated that he was armed or

pat-down was not justifiable, and exceeded the permissible scope of a weapons search.⁴⁷⁴

4. Consent searches

An exception to the requirement that a search be conducted pursuant to a warrant arises when the party whose person or property to be searched consents to the search.⁴⁷⁵ The consent must be voluntarily given.⁴⁷⁶ Whether the consent is "voluntary" is a question of fact to be determined from the totality of the circumstances.⁴⁷⁷

In *United States v. Crenshaw*,⁴⁷⁸ the Ninth Circuit upheld the warrantless search of a shaving kit based on consent, and a pat-down search pursuant to either consent or reasonable suspicion that the suspect was armed.⁴⁷⁹ Two armed men robbed a Washington bank. After the robbery, witnesses observed two men with a suitcase crossing a field toward the airport, and a small airplane was subsequently seen leaving the airport. The airplane was traced to defendant Lehman in Sacramento. Lehman and defendant Gordon were questioned, and Gordon was arrested for carrying a concealed weapon which matched the description of one of the robbery weapons. Lehman was released, but later arrested at the airport, where he described the two men who had accompanied him. While holding Lehman at the airport, FBI agents found a man matching the description Lehman had given. The man

dangerous. Furthermore, Snyder testified that he believed that probable cause existed to further detain the defendant for narcotics investigation. Finally, contrary to the search in this case, a pat-down search is usually conducted when an officer first comes in contact with a person whom the officer justifiably believes may be armed and dangerous. *Id.*

474. *Id.* See also *United States v. Del Toro*, 464 F.2d 520 (2d Cir. 1972) (court held that ten dollar bill folded to a size of 2" by 3/4" and containing 2.2 grams of cocaine, which was felt by officer in the handkerchief pocket of defendant's suit coat, could not reasonably have aroused officer's suspicion that it was a weapon).

Judge Alarcon dissented, arguing that the search was justified as a lawful search incident to arrest. 698 F.2d at 978-80 (Alarcon, J., dissenting). Because of the outstanding non-support warrant for the defendant, Judge Alarcon contended that sufficient probable cause existed to uphold the arrest. Therefore, no added justification was required to support a search. *Id.* at 979 (Alarcon, J., dissenting). The majority determined that there was no probable cause to arrest, since the officer's actions were not based on the nonsupport warrant. *Id.* at 975. However, the dissent maintained that the officer's intentions were "not legally relevant in determining if the objective facts demonstrated probable cause." *Id.* at 980 (Alarcon, J., dissenting).

475. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

476. *Id.* at 221-22.

477. *Id.* at 227.

478. 698 F.2d 1060 (9th Cir. 1983).

479. *Id.* at 1062-63. The court made an alternative holding that the pat-down search was justified by either of the two exceptions to the warrant requirement.

identified himself as "Mr. Rudd," and denied knowing Lehman.⁴⁸⁰

In a subsequent search of the airplane, Lehman's phone directory was discovered. Several phone numbers in this directory coincided with the numbers in an address book found in Mr. Rudd's shaving kit.⁴⁸¹ A pat-down search of Mr. Rudd was conducted.⁴⁸² Mr. Rudd was arrested and later identified as defendant Crenshaw.⁴⁸³ A motel key which was found in Crenshaw's pocket during the pat-down search led to the discovery, at the motel, of a handgun similar to a weapon used in the robbery. It was also determined that the three defendants had occupied rooms at that same motel.⁴⁸⁴

The Ninth Circuit upheld the district court's ruling that Crenshaw voluntarily permitted the search of his shaving kit. The court ruled that the lower court's finding that Crenshaw was not in custody was not clearly erroneous.⁴⁸⁵ The court also held that the pat-down search was justified by either consent or reasonable suspicion that Crenshaw was armed.⁴⁸⁶ It determined that the record disclosed no evidence that the FBI agents led Crenshaw to believe he was under arrest when he consented to the pat-down search.⁴⁸⁷

480. *Id.* at 1061-62.

481. The specific circumstances surrounding the search of the shaving kit were not given in the opinion.

482. The basis for the pat-down search was not stated in the opinion.

483. The opinion does not clearly explain at what point Crenshaw was arrested. Therefore, it is difficult to determine the basis for his arrest. There is an implication that the arrest followed the search of the motel room and the discovery of the gun.

484. *Id.*

485. *Id.* No evidence existed to show that the agents led Crenshaw to believe he was under arrest when the shaving kit was searched. *Id.* See *Schneckloth v. Bustamonte*, 412 U.S. at 248-49 (in a non-custodial consent search, the state must prove that the consent was given voluntarily, "and [was] not the result of duress or coercion, express or implied").

486. 698 F.2d at 1062-63. Although the motel room key was not described, it is presumed that if the pat-down search was justified on the basis of a weapons frisk and, if during the pat-down search of the outside of Crenshaw's clothing the key felt sufficiently similar to a weapon, it would justify the agent's further intrusion into Crenshaw's pockets to confiscate the key.

487. *Id.* at 1062. Crenshaw argued that the affidavit supporting the warrant to search his room was inadequate. He contended that the pat-down search which produced the room key and the subsequent arrest were without probable cause. The court disagreed because the affidavit "clearly state[d] facts upon which the issuing magistrate could conclude that the pat-down search was based on either consent or a reasonable suspicion that Crenshaw was armed." *Id.* at 1062-63. The court further stated that, even if the warrant was faulty, the error was harmless because there was no reasonable possibility that the evidence discovered in Crenshaw's room, a gun similar to a weapon used in the robbery, materially affected the verdict. *Id.* at 1063. See *United States v. Valle-Valdez*, 554 F.2d 911, 915 (9th Cir. 1977) (an appellate court need not reverse a constitutional error unless there is a "reasonable possibility" that the error materially affected the verdict).

Permission to search may be obtained from a third party who possesses "common authority over or other sufficient relationship to the premises . . . sought to be inspected."⁴⁸⁸ This "common authority" rests upon mutual use of the property by persons who generally have joint access or control. The assumption is that it is reasonable for any co-inhabitant to permit the search in his or her own right, and that the others have assumed the risk that a co-inhabitant might allow the common area to be searched.⁴⁸⁹

In *United States v. Miller*,⁴⁹⁰ the Ninth Circuit held that the consent for a warrantless search granted by the defendant's son was valid because the son possessed common authority over the property. The court reasoned that the defendant assumed the risk that someone having authority over the area to be searched would permit the intrusion.⁴⁹¹

In *Miller*, Szombathy's trailer and three conveyor belts were stolen. Government agents asked him to examine a trailer parked alongside the frontage road running to Miller's property. Szombathy sought and received permission from the agents to search Miller's property by posing as a prospective buyer of mining equipment.⁴⁹² When Szombathy arrived at the property, Miller's son allowed him to enter, and Szombathy saw his stolen trailer and conveyor belts. After Szombathy reported his observations to the agents, they decided to obtain a search warrant.

In the meantime, Szombathy decided to return to Miller's property to photograph the stolen equipment. Despite the officers' objections, Szombathy returned to take photographs. An agent accompanied and observed him from a distance for protective reasons.⁴⁹³ Szombathy again encountered Miller's son, who did not object to a return visit. The photographs were eventually used as evidence at Miller's trial.⁴⁹⁴

488. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

489. *Id.* at 171 n.7.

490. 688 F.2d 652 (9th Cir. 1982).

491. *Id.* at 658-59.

492. The agent stated that he "didn't see anything wrong with that at all," and agreed to meet Szombathy when he returned from Miller's property. *Id.* at 655.

493. The agent watched Szombathy from a distance through binoculars. *Id.* at 656. This may or may not contradict the testimony that neither the stolen trailer nor the conveyor belts were visible from the frontage road. *Id.* at 655. The court's opinion did not make clear whether the frontage road was at the same elevation as the agent's vantage point.

494. *Id.* at 656. Three days later, a search warrant was obtained, but the stolen equipment was not found on Miller's property. Miller was indicted for receiving and concealing a stolen trailer. Szombathy's stolen property was subsequently recovered from locations other than Miller's property. *Id.*

Miller appealed the district court's denial of his motion to suppress the evidence obtained during Szombathy's visits to his property.⁴⁹⁵ The Ninth Circuit first found that there was no error in the district court's decision that Szombathy acted in a private capacity and therefore was not subject to fourth amendment restrictions on government activity.⁴⁹⁶ However, the court also concluded that even if Szombathy had acted as an instrument of the government, Miller did not suffer an unreasonable, warrantless intrusion into his privacy because his son had consented to Szombathy's entrance onto the property.⁴⁹⁷

The court determined that Szombathy's examination of the trailers parked along the frontage road which were marked "for sale" was merely an examination of items that were exposed to plain view. When Szombathy entered Miller's property, where he discovered his stolen trailer and conveyor belts, he was escorted by Miller's son.⁴⁹⁸ The court held that Miller had no reasonable expectation of privacy over objects in the plain view of persons invited onto his premises. By placing the stolen trailer and conveyors on his property, Miller assumed the risk that they would be observed by someone invited onto his property through third party consent.⁴⁹⁹ Finally, the court noted that in walking

495. *Id.*

496. *Id.* at 656-58. A search by a private party does not violate the fourth amendment, unless the party conducts the search as an instrument or agent of the state. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (when defendant's wife presented his clothing and guns to the police, she was not acting as an instrument of the government). The Ninth Circuit agreed with the district court's finding that Szombathy's contacts with the law enforcement officers did not make him an agent of the government; therefore, he was acting as a private citizen. 688 F.2d at 656-58.

497. 688 F.2d at 658.

498. *Id.* The court found that Miller's son had the authority to invite Szombathy onto the premises, since Miller's son had access to and control over Miller's shop area and the area surrounding his residence. *See United States v. Matlock*, 415 U.S. 164, 171 (1974) (consent may be given by a third party who has "common authority over or other sufficient relationship to the premises or effects sought to be inspected"). *Matlock* defined common authority as that which rests on:

mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171 n.7.

499. 688 F.2d at 658-59. *See United States v. Buettner-Janusch*, 646 F.2d 759, 764 (2d Cir.) (third party consent "validates a search only when a defendant can be said to have assumed the risk that someone having authority over the area to be searched would permit the governmental intrusion in his own right"), *cert. denied*, 454 U.S. 830 (1981).

Miller also argued that Szombathy gained entry to his property by utilizing a "false pretext," by pretending to be a prospective trailer buyer without explaining the true purpose of his visit. The Ninth Circuit found that "this alleged pretext did not spoil the fruits of

about Miller's premises, Szombathy never exceeded the scope of his invitation.⁵⁰⁰

5. Automobile searches

The automobile exception⁵⁰¹ permits a warrantless search of a vehicle where there is probable cause to believe that evidence is in the vehicle and circumstances exist to support the belief that the vehicle might be removed from the area before a warrant could be obtained.⁵⁰²

In *United States v. Wiecking*,⁵⁰³ a store detective noticed headphones and some foam on a desk in the stockroom. After a store employee told him that this was suspicious, he returned to check on the headphones, but they were gone. He looked for Wiecking, the only stockman on duty, but Wiecking had left. He also noted that some garbage cans in the stockroom had just been emptied. The detective then went to the parking lot where he observed Wiecking taking a plastic bag and some foam out of a dumpster and putting them into his car. When the detective approached, Wiecking slammed the door shut. The detective identified himself and asked Wiecking to bring the plastic bag from the car into the manager's office. Wiecking then admitted that the bag contained the headphones.⁵⁰⁴

The Ninth Circuit found that the vehicle search was supported by probable cause.⁵⁰⁵ The court said that the detective's observation that

Szombathy's visit." 688 F.2d at 659. *See* *Lewis v. United States*, 385 U.S. 206, 211-12 (1966) (Court upheld governmental intrusion into defendant's home when undercover agent was invited into home to purchase marijuana after agent had misrepresented his identity). *See also* *United States v. Glassel*, 488 F.2d 143, 145 (9th Cir. 1973) ("an officer may legitimately obtain an invitation into a house by misrepresenting his identity"), *cert. denied*, 416 U.S. 941 (1974).

500. 688 F.2d at 659. *See* *Glassel*, 488 F.2d at 145 ("once inside the house, [the officer] cannot exceed the scope of his invitation . . . but he may seize anything in plain view"). The Ninth Circuit also found that Szombathy's second visit to Miller's property, to take pictures, was justified because it "was preceded by at least implicit consent." 688 F.2d at 659. Szombathy testified that, during his second visit, he told Miller's son that he wanted another look at what he had previously been shown. The court concluded that because there was no objection to the second visit, this "search" was similarly premised on consent. *Id.* at 659.

501. This exception was first recognized in *Carroll v. United States*, 267 U.S. 132 (1925).

502. *Id.* at 153-54.

503. 703 F.2d 408 (9th Cir. 1983).

504. *Id.* at 409.

505. *Id.* at 410. "Probable cause does not require proof of criminal activity, but only facts and circumstances sufficient to warrant a reasonable belief that an offense has been committed." *Id.* (citing *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)). The Court in *Brinegar* stated that "[p]robable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] suffi-

the headphones and stockroom trash had just been removed, coupled with Wiecking's suspicious action in removing foam and a plastic bag from the dumpster, provided probable cause to believe that the plastic bag contained the headphones.⁵⁰⁶

Wiecking was about to leave in a car that the detective had probable cause to believe contained stolen goods. The court held that the search was lawful under the automobile exception.⁵⁰⁷ The court also held that the fact that the headphones were in a plastic bag made no difference to the legality of the search.⁵⁰⁸

In *Michigan v. Long*,⁵⁰⁹ the United States Supreme Court held that a *Terry*-type protective search for weapons may be extended to a search

cient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." 338 U.S. at 175-76 (quoting *Carroll v. United States*, 267 U.S. at 162). See also *United States v. Garza-Hernandez*, 623 F.2d 496, 499 (7th Cir. 1980) ("[a]s the term itself implies, probable cause exists if the probability is that the thing sought is in the place to be searched; probabilities are to be assessed in the light of practical experience and the practical inferences to be drawn from known or reliable facts"). Once the *Wiecking* court had ruled that probable cause for the search existed, it determined that it did not need to decide whether Wiecking had consented to the search, as the district court had held. 703 F.2d at 409-10.

The court further declared that it was not clear whether Wiecking wished to suppress the evidence as the fruit of an illegal search or an illegal arrest. However, the court found that this distinction made no difference because the inquiry into whether there was probable cause to arrest Wiecking was the same inquiry necessary to determine whether there was probable cause to search. Therefore, the court concluded that its discussion of probable cause applied to the legality of both the search and the arrest. *Id.* at 410 n.2.

506. 703 F.2d at 410.

507. The court compared the present case to *United States v. Ross*, 456 U.S. 798 (1982), where the Supreme Court held that police may conduct a warrantless search of a car when there is probable cause to believe that it contains evidence of criminal activity. *Id.* at 824-25. In *Ross*, police officers received information that a described individual was selling narcotics kept in the trunk of a specified car parked at a certain location. The officers stopped the car and arrested the driver. A search of the trunk revealed a closed brown paper bag, and, upon inspection of its contents, heroin was discovered. A subsequent warrantless search of the trunk at police headquarters disclosed a zippered leather pouch containing cash. *Id.* at 800-01.

The *Wiecking* court found that the facts of this case were different from those in *Ross* in that the defendant's car was not stopped as it moved along a street, but the essential considerations were identical because Wiecking was about to drive off in a car that the detective had probable cause to suspect contained stolen goods. Under these circumstances, the court ruled that no warrant was needed. 703 F.2d at 410.

508. 703 F.2d at 410. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* (citing *Ross*, 456 U.S. at 825).

The court distinguished *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), relied upon by the defendant as supporting the argument that the search required a warrant. The court found that unlike *Wiecking*, the suspect in *Coolidge* was already in custody and therefore had no opportunity to destroy the evidence sought inside the vehicle. 703 F.2d at 410 n.3.

509. 103 S. Ct. 3469 (1983).

of the passenger compartment of an automobile, if limited to those areas in which a weapon might be hidden.⁵¹⁰ In *Long*, two police officers observed a car at night, travelling erratically at an excessive speed. After the car swerved into a ditch, the officers stopped to investigate and were met at the rear of the car by Long, the car's only occupant. Long "appeared to be under the influence of something," and did not respond to initial requests to produce his license and registration.⁵¹¹ As he walked to the passenger compartment, apparently to obtain the registration, the officers observed a hunting knife on the floorboard of the driver's side of the car. Consequently, the officers subjected Long to a pat-down search but did not find any weapons. One of the officers shined his flashlight into the car, saw something protruding from under the armrest, and, upon lifting the armrest, discovered an open pouch containing marijuana. Long was arrested for possession of marijuana. After the officers impounded the vehicle, seventy-five pounds of marijuana were found in the trunk.⁵¹²

The Michigan Supreme Court held that the officer's entry could not be justified under the authority of *Terry v. Ohio*,⁵¹³ because "*Terry* authorized only a limited pat-down search of a *person* suspected of criminal activity" rather than the inspection of an area.⁵¹⁴ The United States Supreme Court reversed the state court decision because of the danger involved in an investigative automobile stop.⁵¹⁵

The Supreme Court has noted in cases subsequent to *Terry* that investigations involving suspects in vehicles are especially dangerous to

510. *Id.* at 3480. The *Terry*-type search is lawful if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the officer to believe that the suspect is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 21, 30-31 (1968).

511. 103 S. Ct. at 3473.

512. *Id.*

513. 392 U.S. 1 (1968). In *Terry*, the Court upheld the legality of a "stop-and-frisk," in the absence of probable cause and a warrant, where an officer detained persons suspected of being involved in criminal activity. The officer, fearing that the suspects were armed, patted down the outside of their clothing and discovered two revolvers. The Court ruled that when an officer has a reasonable belief that the suspect being investigated at close range is "armed and presently dangerous to the officer or to others, it would . . . be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24.

514. 103 S. Ct. at 3478 (quoting *People v. Long*, 413 Mich. 461, 472, 320 N.W.2d 866, 869 (1982)).

515. *Id.* at 3481-82. See also Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCIENCE 93 (1963) [hereinafter cited as Bristow]. In Bristow, 32% (35 of 110 cases) of the shootings studied occurred while the officer attempted to investigate, control, or pursue suspects who were in automobiles. *Id.*

police officers.⁵¹⁶ As a result, the Court has held that officers may order persons out of their automobile during a traffic violation stop, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous.⁵¹⁷

The Court also observed that suspects may injure police officers through their access to weapons, even though they may not be personally armed.⁵¹⁸ The Court has held that an officer may search incident to arrest "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."⁵¹⁹ The Court has also held that the passenger compartment of an automobile is generally within this area.⁵²⁰

The *Long* Court concluded that a protective search for weapons inside the passenger compartment of an automobile is permissible if the police officer reasonably believes that the suspect is dangerous and may gain immediate control of weapons.⁵²¹ The Court further ruled that if contraband other than weapons is discovered during this search the fourth amendment does not require that this evidence be suppressed.⁵²²

516. 103 S. Ct. at 3479. See *Pennsylvania v. Simms*, 434 U.S. 106 (1977); *Adams v. Williams*, 407 U.S. 143 (1972).

517. See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 110-12 (1977) (decision in part because of the "inordinate risk confronting an officer as he approaches a person seated in an automobile.").

The Court has also held that the police may reach into the passenger compartment of an automobile to remove a gun from a driver's waistband based only upon an informant's tip, even though the gun was not apparent to the police from outside the car. *Adams v. Williams*, 407 U.S. 143, 146-47 (1972).

518. 103 S. Ct. at 3480.

519. *Chimel v. California*, 395 U.S. 752, 763 (1969). The *Chimel* Court reasoned that "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." *Id.* The *Long* Court noted that the *Chimel* Court relied explicitly on *Terry*. 103 S. Ct. at 3480. Nonetheless, it must be noted that *Chimel* was a search incident to arrest case and did not merely involve an investigative stop, as in *Long*. For search incident to arrest cases, see *supra* notes 444-64 and accompanying text.

520. *New York v. Belton*, 453 U.S. 454, 460-61 (1981) (Court ruled that police may search contents of open or closed containers within passenger compartment if passenger compartment is within reach of arrestee). Unlike the situation in *Long*, *Belton* involved a search incident to arrest, rather than a mere investigative stop.

521. 103 S. Ct. at 3480. This belief must be based upon "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer to believe that the suspect is dangerous and that the suspect may gain immediate control of weapons. *Id.* (quoting *Terry v. Ohio*, 392 U.S. at 21). The *Long* Court emphasized that a *Terry* search is justified only for the protection of officers and others nearby, and it is not justified by the prevention of the destruction of evidence. *Id.* at 3480 n.14.

522. *Id.* at 3481 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971)).

The dissent argued that *Terry* did not support the Court's conclusion and that the Court was "distorting *Terry* beyond recognition" by using it as a "weapon against the Fourth Amendment's fundamental requirement that searches and seizures be based on probable cause."⁵²³ The dissent also maintained that the majority incorrectly relied upon search incident to arrest cases⁵²⁴ to support its extension of *Terry*.⁵²⁵

Terry expressly stated that stop-and-frisk searches must be carefully limited in scope.⁵²⁶ The dissent reasoned that the *Long* majority upheld a search whose intrusiveness was much more severe than that of a frisk.⁵²⁷ The dissent concluded by stating that "a search of a car and the containers within it based on nothing more than reasonable suspicion, even under the circumstances present here, cannot be sustained without doing violence to the requirements of the Fourth Amendment."⁵²⁸ The *Long* Court's extension of *Terry*-type searches to automobiles reflects its current trend to broaden the government's ability to intrude into an individual's expectation of privacy in a vehicle. It can be argued that the *Long* majority should at least have established some limitations upon the use of *Long* to justify an automobile search. A weapon could be hidden anywhere within an automobile. Thus, it is possible that there will be a temptation to use a weapon search as a mere pretense to facilitate the search of an automobile.

523. *Id.* at 3483 (Brennan, J., dissenting) (Justice Marshall joined in Justice Brennan's dissent). The dissent stated that *Terry* authorized only a "carefully limited search of the outer clothing of . . . persons in an attempt to discover weapons which might be used to assault [an officer]." *Id.* at 3484 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

524. The cases relied upon by the majority were *Chimel v. California*, 395 U.S. 752 (1969) and *New York v. Belton*, 453 U.S. 454 (1981).

525. The dissent stated that the *Terry* Court expressly recognized the difference between a search incident to arrest and the limited weapons search in *Terry*. 103 S. Ct. at 3484-85 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). See *United States v. Robinson*, 414 U.S. 218, 227-28 (1973) (Court relied upon difference between search incident to arrest and *Terry* pat-down searches to reject argument that *Terry* limitations be applied to searches incident to arrest). The *Long* majority declared that its use of *Chimel* and *Belton* was limited to their recognition that part of the justification for a search incident to an arrest is the same as the rationale for a *Terry* search, in other words, the protection of officers from injury. 103 S. Ct. at 3480 n.14.

526. *Terry v. Ohio*, 392 U.S. at 30.

527. 103 S. Ct. at 3484-86. The dissent argued that the majority incorrectly considered the search of an unoccupied car and any containers found therein as being as minimally intrusive as a frisk. *Id.* Furthermore, the dissent felt that the majority should have established some guidelines limiting this extension of the *Terry* search. Potential problems foreseen in interpreting the Court's holding included: a weapon may presumably be placed or hidden anywhere in a car; a weapon may be hidden in any container; and, an individual may lawfully possess many items that may be used as weapons, such as hammers or baseball bats. *Id.* at 3486-87.

528. *Id.* at 3488.

6. Border searches

Neither a warrant nor probable cause are necessary to conduct a border search.⁵²⁹ In the Ninth Circuit, the most intrusive border searches require a relatively high level of suspicion.⁵³⁰ A strip search requires authorities to have a "real suspicion" that the person is smuggling contraband. A body cavity search and an X-ray search require the stricter standard of a "clear indication" or "plain suggestion" that the person is carrying contraband within his or her body.⁵³¹

In *United States v. Faherty*,⁵³² the Ninth Circuit upheld the strip search of a defendant based upon the "real suspicion" standard.⁵³³ Airport customs officials discovered that Faherty was returning from a narcotics source country, that she was self-employed but could not substantiate her employment, that she was overly friendly, that she was displaying restricted movements, and that she was chilled and sleepy. Faherty was detained, and a baggage search revealed a notebook containing the name of a suspected drug smuggler. A strip search was conducted but revealed nothing. Faherty subsequently refused to consent to an X-ray search.

After being advised that she would be held while a court order was being requested and that the court order would probably be granted, she consented to the X-ray examination which revealed a foreign object in her body. At the hospital, six hours after the strip search, Faherty expelled a balloon containing heroin.⁵³⁴

The Ninth Circuit recognized that a strip search must be justified through the application of the "real suspicion" standard.⁵³⁵ This test is defined as "'subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross [the] border is concealing something on his body for the purpose of transporting it

529. *United States v. Moore*, 638 F.2d 1171, 1173 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). This rule is not limited to the border itself. For example, the first United States point at which an international flight lands is considered the functional equivalent of the border. *Id.*

530. *United States v. Ek*, 676 F.2d 379, 382 (9th Cir. 1982) (citing *United States v. Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980)).

531. *Id.* (quoting *United States v. Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980)).

532. 692 F.2d 1258 (9th Cir. 1982).

533. *Id.* at 1260.

534. *Id.* at 1259-60.

535. The "real suspicion" standard was defined in *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970) (a customs official's simple good faith in having subjective suspicion unsupported by objective facts does not convert "mere suspicion" into "real suspicion").

into the United States' "contrary to law."⁵³⁶ The court found that the facts known to the agent who ordered the strip search constituted "real suspicion."⁵³⁷ Therefore, the search was valid.

In *United States v. Shreve*,⁵³⁸ the Ninth Circuit upheld an X-ray search based on the "clear indication" standard.⁵³⁹ Shreve arrived at Los Angeles International Airport from Peru, a known cocaine source country. He brought attention to himself because he walked in an "unnaturally erect and stiff manner" which is a trait of body cavity smugglers. Customs officials discovered that Shreve was unemployed, travelling alone, and had paid for the airline ticket in cash. Using a new passport, he had just returned from a short trip to a country where he knew no one. The officials also noted that his eyes were dilated and he was nervous and unusually talkative, although his speech was slurred. Receipts uncovered in his luggage suggested that he had consumed only beverages within the last three days, a characteristic of body cavity smuggling. Also discovered was a bottle of oil which could be used to lubricate objects inserted into the rectum. A subsequent X-ray search determined that Shreve was smuggling cocaine within his body.⁵⁴⁰

The Ninth Circuit first noted that to conduct an X-ray search, there must be a "clear indication" of body cavity smuggling.⁵⁴¹ The *Shreve* court reasoned that the frequency of body cavity smuggling and

536. 692 F.2d at 1260 (quoting *Guadalupe-Garza*, 421 F.2d at 879).

537. *Id.* Addressing the issue of whether Faherty's consent for the X-ray examination was voluntary, the court recognized that the trial court's ruling should be reversed only if, after viewing the evidence in the light most favorable to the government, the lower court was clearly erroneous. *Id.* (citing *United States v. O'Looney*, 544 F.2d 385 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976)). The question of whether the consent was voluntary is "a question of fact to be determined from the totality of the circumstances." 692 F.2d at 1261 (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). In the present case, Faherty understood that her consent or a court order was required for the X-ray search, that she would be detained while a court order was requested, and that the court order would probably be granted. In light of these facts, the appellate court could not say that the trial court was clearly erroneous in its finding that Faherty voluntarily consented to the X-ray search, and therefore affirmed the trial court's decision. *Id.*

538. 697 F.2d 873 (9th Cir. 1983).

539. *Id.* at 874.

540. *Id.*

541. *Id.* (citing *United States v. Ek*, 676 F.2d 379, 382 (9th Cir. 1982)). In *Ek*, the court held that the stricter standard required for a body cavity search also applies to an X-ray search. 676 F.2d at 382. The court held that an X-ray search is more intrusive than a strip search because it is "potentially [more] harmful to the health of the suspect. It goes beyond the passive inspection of body surfaces." *Id.* A body cavity search requires a "clear indication" or "plain suggestion" that the suspect is smuggling narcotics inside his body. *Id.* (quoting *United States v. Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980)).

the danger to the public through narcotics use, compared to the "slight intrusion of an X-ray search without a specific showing of medical dangers, may make the wisdom of [requiring a "clear indication" of smuggling] doubtful."⁵⁴² Nevertheless, the court followed the precedential law of the circuit.⁵⁴³ Despite its dissatisfaction with the use of the "clear indication" standard rather than some lower standard, the court found that the customs officials' observations properly supported their determination that there was a clear indication of body cavity smuggling here.⁵⁴⁴

In *United States v. Villamonte-Marquez*,⁵⁴⁵ the United States Supreme Court upheld the suspicionless boarding of a vessel by customs agents in a channel accessible to the open sea.⁵⁴⁶ Customs officers sighted an anchored, forty-foot sailboat near a Customs Port of Entry.⁵⁴⁷ After the wake of a passing boat caused the sailboat to rock violently, one of the sailboat's crewmembers shrugged his shoulders in an unresponsive manner when asked if he and his companions were all right. A customs officer and a Louisiana state policeman then boarded the vessel and asked to examine the ship's documents.⁵⁴⁸ While examining the papers, a customs officer detected an odor that smelled like burning marijuana. He looked through an open hatch and noticed burlap-wrapped bales that were later found to be marijuana. The defendants were arrested and a subsequent search revealed 5800 pounds of

542. 697 F.2d at 874.

543. *Id.* The *Ek* court, in finding that a showing of the stricter "clear indication" standard is required for X-ray examinations, determined that such searches are potentially harmful to a suspect's health. See *supra* note 541. Nonetheless, Judge Kennedy in *Shreve* expressed his disbelief of the harmful effects of X-ray radiation. Contrary to *Ek*, Judge Kennedy opted for the use of a lesser standard, maintaining that an X-ray is a "slight intrusion." 697 F.2d at 874.

544. *Id.*

545. 103 S. Ct. 2573 (1983).

546. *Id.* at 2582. The boarding was authorized by 19 U.S.C. § 1581(a) (1976), which provides in pertinent part that "any officer of the customs may at any time go on board of any vessel . . . at any place in the United States or within the customs waters . . . and examine the manifest and other documents and papers."

547. The customs officers were patrolling a ship channel that connects the Gulf of Mexico with Lake Charles, Louisiana, a Customs Port of Entry. 103 S. Ct. at 2574.

548. The defendants argued that the government could not rely on the documentation inspection statute because the authorities had been investigating an informant's tip that a boat in the ship channel was carrying marijuana. The Court rejected this contention, declaring that "[w]e would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers." *Id.* at 2577 n.3 (quoting *United States v. Arra*, 630 F.2d 836, 846 (1st Cir. 1980)). Thus, many of the facts in *Villamonte-Marquez* were irrelevant and the real issue was the government's power to board any vessel at any time, even when the documentation inspection was being used as a pretense.

marijuana stored throughout the vessel.⁵⁴⁹ The defendants were convicted of various narcotics offenses,⁵⁵⁰ but the Fifth Circuit reversed, holding that the boarding violated the fourth amendment because it occurred without a "reasonable suspicion of a law violation."⁵⁵¹

The government contended that the boarding was statutorily authorized.⁵⁵² The defendant argued that although the boarding was authorized by statute, it violated the fourth amendment.⁵⁵³ The Court noted that a statute cannot authorize a violation of the fourth amendment. Nonetheless, the First Congress authorized, in a predecessor to the present statute, the suspicionless boarding of vessels.⁵⁵⁴ According to the majority, this suggested that the same Congress which adopted the fourth amendment did not view these boardings as unconstitutional.⁵⁵⁵

The Court observed that random vehicle stops away from the international border are not permissible without reasonable articulable suspicion.⁵⁵⁶ However, the Court has recognized that stops at fixed

549. *Id.* at 2577.

550. The defendants were found guilty of conspiring to import marijuana in violation of 21 U.S.C. § 963 (1981), importing marijuana in violation of 21 U.S.C. § 952(a) (1981), conspiring to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846 (1981), and possessing marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1981). 103 S. Ct. at 2577.

551. 103 S. Ct. at 2577 (citing *United States v. Villamonte-Marquez*, 652 F.2d 481, 488 (5th Cir. 1981)).

552. *Id.* at 2578 (citing 19 U.S.C. § 1581(a) (1976)). See *supra* note 546.

553. 103 S. Ct. at 2578.

554. *Id.* at 2577-78. The purpose of the Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (1790), was "to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels." Section 31 of that Act provided that:

[I]t shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters hereinafter mentioned, to go on board of ships or vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels

1 Stat. 164. The statute at issue in the present case, 19 U.S.C. § 1581(a) (1976), provides that "[a]ny officer of the customs may at any time go on board of any vessel . . . at any place in the United States or within the customs waters . . . and examine the manifest and other documents and papers." 103 S. Ct. at 2577-78.

555. 103 S. Ct. at 2578-79 (citing *Boyd v. United States*, 116 U.S. 616 (1886)). In *Boyd*, the Court stated "[a]s this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." *Id.* at 623.

556. 103 S. Ct. at 2579 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)). In *Brignoni-Ponce*, the Court stated "[e]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts,

checkpoints or roadblocks which are away from the border are permissible.⁵⁵⁷ The *Villamonte-Marquez* Court noted that its focus on this area of law was on the "reasonableness" of the type of governmental intrusion. The permissibility of this intrusion is to be decided by balancing the intrusion upon the individual's fourth amendment rights against the promotion of legitimate governmental interests.⁵⁵⁸

The decisive factor in *Villamonte-Marquez* was that the stop was of a vessel with ready access to the open sea. The Court stated that it was clear that had this been an automobile stop on a public highway, it would have been unlawful without reasonable suspicion.⁵⁵⁹ However, the Court found that commerce in waters providing ready access to the open sea is sufficiently different from highway traffic so as to make alternatives to the "stop" made in the present case less likely to accomplish the essential governmental purposes involved. The Court ruled that no reasonable claim could be made that permanent checkpoints would be practical on waters which lead to the open sea, where vessels can move in any direction and need not follow established routes.⁵⁶⁰

together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." 422 U.S. at 884.

557. 103 S. Ct. at 2579 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)). In *Martinez-Fuerte*, the Court upheld the maintenance of permanent checkpoints at or near intersections of important roads leading away from the border at which a vehicle could be stopped for brief questioning "even though there is no reason to believe the particular vehicle contains illegal aliens." 428 U.S. at 545. The *Martinez-Fuerte* Court distinguished the holding in *Brignoni-Ponce* stating:

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly.

Id. at 557.

In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court held unlawful a random stop to check the defendant's license and vehicle registration. The Court stated that the mere fact that the government regulates "persons in automobiles on public roadways [does] not for that reason alone [justify that] their travel and privacy [may be] interfered with at the unbridled discretion of police officers." *Id.* at 663. The Court declared that states are free to develop less discretionary methods, such as questioning all oncoming traffic at roadblocks, which could similarly accomplish the state's purpose of enforcing auto registration and safety laws. *Id.*

558. 103 S. Ct. at 2579.

559. *Id.*

560. *Id.* Another significant difference between automobiles and boats noted by the Court is their system of external markings. An officer may often ascertain an automobile's compliance with registration and safety laws merely by observing the license plate and other external markings. However, no such licenses or decals are issued to vessels. The external markings on American boats are placed on the vessel at the owner's discretion. Further-

The Court stated that the government has a substantial interest in assuring compliance with documentation requirements,⁵⁶¹ especially where there is a substantial need to deter or apprehend smugglers.⁵⁶² Further, the Court held that this is only a "modest intrusion," since it "involves only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents."⁵⁶³ Therefore, the Court concluded that the boarding of the sailboat was "reasonable" under the fourth amendment.⁵⁶⁴

The dissent contended that "for the first time in the . . . history of the Fourth Amendment, the Court approve[d] a completely random . . . entry onto private, noncommercial premises by police officers, without any limitations whatever on the officers' discretion or any safeguards against abuse."⁵⁶⁵ The dissent disagreed with the majority's

more, as in the present case, where the vessel is foreign, the markings are only those required by its home port. Here, the markings were Swiss, but the vessel carried French papers. *Id.*

561. Statutes and regulations governing maritime documentation are more extensive and complex than the typical state's requirements for vehicle licensing. Documentation laws play an important role in regulating various trades, enforcing environmental laws, collecting duties, regulating imports and exports, and preventing entry of controlled substances, illegal aliens, adulterated foods, dangerous chemicals, prohibited agricultural products and animals, and illegal weapons and explosives. These interests are greatest in areas such as the ship channel in this case, which connects the open sea with a Customs Port of Entry. *Id.* at 2581.

The defendants suggested that while the public interest is great in stopping commercial vessels, it is not so with "pleasure boats." However, the Court stated that the difficulty of drawing such a line was exemplified by this case. Here, the defendants asserted that they were in a "pleasure boat," however, they were involved in a "highly lucrative commercial trade." *Id.* at 2581 n.6.

562. *Id.* at 2581.

563. *Id.* In *United States v. Brignoni-Ponce*, 422 U.S. at 880, the Court stated that, according to the government, the stops were modest—usually one minute, with no search of the vehicle or its occupants, and visual inspection was limited to those parts of the vehicle that could be seen by anyone standing alongside. The officers also required a response to brief questions and possibly the production of a document showing a right to be in the United States. *Id.* Despite this stop being arguably no more than a "modest intrusion," the Court held that such stops must be based upon reasonable suspicion. *Id.* at 881. In contrast, the *Villamonte-Marquez* Court stated that during the "modest intrusion" "[n]either the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to what can be seen without a search." 103 S. Ct. at 2581 (quoting *Martinez-Fuerte*, 428 U.S. at 558). However, in *Villamonte-Marquez* the Court ruled that the stop did not require reasonable suspicion. 103 S. Ct. at 2582.

564. 103 S. Ct. at 2582.

565. *Id.* at 2585 (Brennan, J., dissenting) (Justice Marshall joined Justice Brennan's dissent). The dissent agreed with the majority that the relevant precedents were those addressing roving patrol or fixed checkpoint stops. *Id.* (Brennan, J., dissenting). The dissent argued that "every one of the vehicle-stop precedents on which the Court relie[d] . . . require[d] that a stop or search be supported by either probable cause, reasonable suspicion, or another discretion-limiting feature such as use of fixed checkpoints." Nonetheless, the ma-

view that "every statute enacted by the First Congress must be presumed to be constitutional."⁵⁶⁶ Furthermore, the dissent construed the old statute to apply only to vessels entering the United States.⁵⁶⁷

Finally, the dissent dismissed the majority's contention that there are special maritime problems in law enforcement. First, although the majority asserted that it is impractical to have fixed checkpoints on water, the dissent argued that the boarding in this case occurred in a channel similar to the interstate highway on which traffic funnels through border patrol checkpoints. Thus, it argued, no distinction should be made between concrete or water highways.⁵⁶⁸ Second, the dissent did not believe that random stops were a necessary tool for law enforcement.⁵⁶⁹ Moreover, the dissent contended that the majority failed to explain why a boarding was necessary to check documents, when officers could easily acquire such information by pulling alongside the vessel, or by radio.⁵⁷⁰

The trend in border searches appears to be toward a limitation of the scope of fourth amendment protections. The court in *United States v. Shreve*⁵⁷¹ expressed its dissatisfaction with the current Ninth Circuit standard requiring a clear indication of body cavity smuggling to justify an X-ray search, but stated that it had no choice but to follow precedent. More importantly, in *United States v. Villamonte-Marquez*,⁵⁷² the Supreme Court took a major step toward increasing the government's ability to conduct a warrantless search by upholding the suspicionless boarding of vessels which have ready access to the open sea.

7. Administrative searches

A warrantless administrative search of commercial property may be permissible under the "pervasively-regulated industries" exception to the fourth amendment.⁵⁷³ Generally, to conduct a warrantless

jority had approved a limitless and standardless authority. *Id.* at 2588-89 (Brennan, J., dissenting).

566. *Id.* at 2586 n.7 (Brennan, J., dissenting).

567. *Id.* (Brennan, J., dissenting).

568. *Id.* at 2589 (Brennan, J., dissenting).

569. *Id.* at 2590 (Brennan, J., dissenting).

570. *Id.* (Brennan, J., dissenting). Addressing the issue of external markings, the dissent argued that it would be easy and inexpensive to provide vessels with markings similar to those used for automobiles. *See supra* note 560.

571. 697 F.2d 873 (9th Cir. 1983).

572. 103 S. Ct. 2573 (1983).

573. This exception was first established in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (warrantless inspections of commercial premises in the regulation of liquor sales) and *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless searches in regula-

search pursuant to this exception, such a search must be authorized by statute and be reasonably necessary to protect important federal interests. The benefits of obtaining a warrant must be minimal because the search is made in "the context of a regulatory inspection system of business premises which is carefully limited in time, place, and scope."⁵⁷⁴ In short, the owner is aware or should be aware that his premises are subject to periodic inspections.⁵⁷⁵

In *United States v. Kaiyo Maru No. 53*,⁵⁷⁶ the Ninth Circuit upheld a warrantless search pursuant to the pervasively-regulated industries exception. A crucial factor in this decision was that the discretion of the inspecting officers was sufficiently limited so as to render the warrantless inspections "reasonable" under the fourth amendment.⁵⁷⁷

The Japanese stern trawler Kaiyo Maru No. 53 (Kaiyo) was fishing by permit in the Fishery Conservation Zone (FCZ) off the coast of Alaska.⁵⁷⁸ A Coast Guard cutter sighted the Kaiyo, and was erroneously informed that the Kaiyo had not given the required notice to be fishing in the area.⁵⁷⁹ The Coast Guard decided to inspect the Kaiyo's documents and catch, and determine whether she was fishing in the proper area.⁵⁸⁰

The Kaiyo was boarded and searched without a warrant or probable cause to believe that any illegality had occurred.⁵⁸¹ The search disclosed serious violations of the Fishery Conservation and Management Act (FCMA or Act),⁵⁸² including underreporting of fish, and a large quantity of halibut, a species prohibited to foreign fishermen.⁵⁸³

The court first addressed the issue of whether there was statutory authorization for the warrantless search.⁵⁸⁴ The defendants argued

tion of firearms), and was recently applied by the Court in *Donovan v. Dewey*, 452 U.S. 594 (1981) (warrantless inspection of mines).

574. *United States v. Biswell*, 406 U.S. at 315.

575. *Donovan v. Dewey*, 452 U.S. at 600.

576. 699 F.2d 989 (9th Cir. 1983).

577. *Id.* at 996.

578. The FCZ is a 197 mile wide area of ocean beyond the United States territorial waters where federal fisheries management jurisdiction prevails. *Id.* at 992.

579. The Kaiyo moved from its assigned fishing area to another area. This change required notification of the Coast Guard, which had in fact been given. *Id.*

580. *Id.*

581. Despite the erroneous information about the notice, the government conceded that any suspicion aroused did not rise to the level of probable cause to suspect wrongdoing. *Id.* at 992 n.3.

582. 16 U.S.C. §§ 1801-1882 (1976).

583. 699 F.2d at 992.

584. The FCMA provides that:

Any officer who is authorized by . . . the Secretary of the department in which the

that the language of section 1861 of the Act requires the use of a warrant when practical but allows warrantless inspections under exigent or other appropriate circumstances.⁵⁸⁵ The Ninth Circuit studied the Act as a whole, the objectives of the Act, and the circumstances surrounding its creation, and held that the Act authorizes warrantless searches and seizures whether or not obtaining a warrant is practicable or exigent circumstances exist.⁵⁸⁶

The court found that the circumstances under which the FCMA was created supported its view that Congress intended to devise the most "potent possible enforcement procedures."⁵⁸⁷ Congress realized that strong measures were required to protect an important national asset which was being dangerously depleted.⁵⁸⁸

Furthermore, the court reasoned that its interpretation of section 1861 was consistent with the objectives of the Act as a whole.⁵⁸⁹ The FCMA requires an agreement between the United States, the foreign nation, and the foreign vessel operators, which includes numerous concessions by the foreign parties, including consent to routine searches.⁵⁹⁰ Moreover, the court found that the Act's stringent requirements sup-

Coast Guard is operating . . . to enforce the provisions of this chapter may—with or without a warrant or other process—board, and search or inspect, any fishing vessel which is subject to the provisions of this chapter.

16 U.S.C. § 1861(b)(1)(A) (1976).

585. 699 F.2d at 993. The legislative history is silent on the matter. *Id.*

586. *See* *Donovan v. Dewey*, 452 U.S. 594, 598 (1981) ("unlike searches of private homes, which must generally be conducted pursuant to a warrant . . . legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment"). The *Donovan* Court further stated:

The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.

Id. at 598-99.

587. 699 F.2d at 994. The FCMA was enacted when commercial and recreational fishing in the areas beyond the three mile jurisdictional limit were threatened by overfishing. Due to the lack of federal action, foreign fishermen were essentially unregulated in this area. *Id.* at 993.

588. *Id.* at 995.

589. *Id.* at 994.

590. *Id.* at 994 n.11. 16 U.S.C. § 1821(c)(2)(A)(i) (1976) sets forth that "[t]he foreign nation, and the owner or operator of any fishing vessel fishing pursuant to such [international fishery] agreement, will abide by the requirement that any officer authorized to enforce the provisions of this chapter . . . be permitted to board, and search or inspect, any such vessel at any time." The defendants argued that "authorized officer" refers to officers authorized by search warrant. The Ninth Circuit disagreed, stating that in § 1861(b) the authorization of officers is done by the Secretary of Transportation (which includes the Coast Guard), and not by the courts by issuing a warrant. Thus, the court found that "an authorized officer" is an officer designated by the government to enforce the FCMA. 699 F.2d at 994 n.12.

port an interpretation that authorizes warrantless searches and seizures.⁵⁹¹ Finally, the court determined that had Congress intended warrantless searches to be allowed only under "exigent or other appropriate circumstances" this would have been expressly stated.⁵⁹²

The court next addressed the issue of whether a warrantless inspection under the FCMA provided a "constitutionally adequate substitute for a warrant."⁵⁹³ The court held that the statute and the enforcement policy of the Coast Guard sufficiently limit the discretion of the inspecting officers so as to render warrantless FCMA inspections "reasonable" within the meaning of the fourth amendment.⁵⁹⁴ First, the enforcement is limited to officers authorized by the Secretary of Transportation.⁵⁹⁵ Second, the fishing vessel is subject to search by a

591. 699 F.2d at 994. These stringent requirements include: (1) foreign fishing vessels in the FCZ must allow official United States observers to board the ship, 16 U.S.C. § 1821(c)(2)(D) (1976), and search or inspect the vessel, 16 U.S.C. § 1821(c)(2)(A)(i) (1976); (2) the permits must be prominently displayed in the wheelhouse and must be shown upon request to any authorized officer, 16 U.S.C. §§ 1821(c)(2)(B), 1821(c)(2)(A) (iii) (1976); and (3) it is a criminal violation to refuse to allow any authorized officer to board a vessel in his quest to search or inspect in connection with the enforcement of the Act, 16 U.S.C. § 1857(1)(D) (1976). Regulations implementing the Act require that extensive records be kept, and these records are subject to inspection at any time. The regulations also require that foreign vessels keep the Coast Guard constantly aware of their location and activities. 50 C.F.R. § 611.9 (1979).

592. 699 F.2d at 994. The court found that Congress "had no difficulty in expressing limitations on warrantless arrests of persons by requiring 'reasonable cause to believe such person has committed an act' prohibited by the FCMA." *Id.* See 16 U.S.C. § 1861(b)(1)(A) (1976). The court further stated that Congress acknowledged the physical difficulties of obtaining a warrant at sea and reasonably concluded that routine warrantless inspections are necessary to enforce the Act. 699 F.2d at 994.

593. 699 F.2d at 996. See *Donovan v. Dewey*, 452 U.S. 594, 603-05 (1981) where the Supreme Court found that the program of warrantless inspections authorized by statute provided a "constitutionally adequate substitute for a warrant," and thus did not violate the fourth amendment. The *Donovan* Court found that the statute clearly notified the operator that inspections would be performed on a regular basis; the statute and the regulations issued pursuant to it informed the operator of what standards must be met to comply with the statute; the discretion of government officials to determine which facilities to inspect and which violations to search for was directly controlled by the regulatory scheme; and the statute itself contained a means by which special privacy concerns could be accommodated. *Id.*

594. 699 F.2d at 996. The court found that the established policy of an agency limiting the inspecting officer's discretion may be considered in addition to the limitations in the authorizing statute to determine whether an inspection program is sufficiently limited to qualify as a constitutionally adequate substitute for a warrant. *Id.* at 996 n.17. See *United States ex rel. Terraciano v. Montonaya*, 493 F.2d 682, 685 (2d Cir.) (where statute did not limit inspection to business hours it was sufficient that Health Department's established policy did), *cert. denied*, 419 U.S. 875 (1974).

595. 699 F.2d at 996.

limited number of government officers.⁵⁹⁶ Third, warrantless inspections are limited to specified fishing vessels.⁵⁹⁷ Fourth, the inspections are not so random or infrequent that the vessel owner has no real expectation that his property will not be inspected from time to time.⁵⁹⁸

The court concluded that foreign fishing in the FCZ is so highly regulated that, given the limitations on the inspection program, a warrant is unnecessary for periodic inspections of foreign fishing vessels to determine compliance with the FCMA and applicable fishing regulations.⁵⁹⁹

In *Illinois v. Lafayette*,⁶⁰⁰ the United States Supreme Court held that it is not unreasonable for police to search an arrestee's personal effects during a routine administrative procedure at a police station incident to booking and jailing the person.⁶⁰¹ Lafayette was involved in an altercation, and was arrested for disturbing the peace. At the police station,⁶⁰² a search of Lafayette's shoulder bag revealed ten amphetamine pills inside a cigarette package. The officer conducting the search testified that it was "standard procedure to inventory 'everything'" in an arrestee's possession, and that he did not seek or expect to find weapons or contraband while conducting the search.⁶⁰³

596. *Id.*

597. *Id.* The Coast Guard limits its boardings to foreign fishing vessels actually engaged in fishing activities or otherwise within the FCZ after notifying the Coast Guard of intent to commence fishing activities and before having "checked out." *Id.*

598. *Id.* In major statistical areas, all fishing vessels requiring an FCMA permit are to be boarded once every three months. *Id.* See *Donovan v. Dewey*, 452 U.S. 594, 600 (1981) (owners of commercial property "cannot help but be aware that [their] property will be subject to periodic inspections undertaken for specific purposes").

599. 699 F.2d at 997. In *Donovan*, the Supreme Court said that "the pervasiveness and regularity of the federal regulation . . . ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment." 452 U.S. at 606.

The FCMA warrantless searches are limited to those areas of the vessel necessary to determine compliance with the FCMA. This would exclude living quarters and the crew's personal property. 699 F.2d at 997 n.23 (citing *United States v. Tsuda Maru*, 470 F. Supp. 1223, 1229 (D. Alaska 1979)).

600. 103 S. Ct. 2605 (1983).

601. *Id.* at 2611.

602. Lafayette was searched in the booking room. *Id.* at 2607. The record was unclear as to whether Lafayette would have been incarcerated after being booked for disturbing the peace. *Id.* at 2611 n.3. The Court stated that this would be an "appropriate inquiry upon remand." *Id.*

603. *Id.* at 2607. At the suppression hearing, the state argued that the officer conducted a lawful inventory search. After the hearing but prior to the ruling, the state submitted a brief arguing for the first time that the search was justified as a search incident to arrest. The trial court ordered the suppression of the pills. The Illinois Appellate Court affirmed. *Id.* at 2605 (citing *People v. Lafayette*, 99 Ill. App. 3d 830, 425 N.E.2d 1383 (1981)). The appellate court held that the argument of a valid search incident to arrest was waived by the state's failure to

The Court recognized that the inventory search has been established as an exception to the warrant requirement,⁶⁰⁴ and does not require probable cause.⁶⁰⁵ Comparing the inventory search with the search incident to arrest exception, the Court noted that upon arrest, an officer may search the arrestee's person⁶⁰⁶ and the area within his control.⁶⁰⁷ The Court acknowledged that an arrestee's transport to the police station is no more than a continuation of the custody due to the arrest. However, the Court observed that the factors justifying a search at the station are dissimilar to the factors justifying an immediate search at the time of the arrest.⁶⁰⁸

After recognizing many governmental interests supporting an inventory process,⁶⁰⁹ the Court ruled that at the station it is proper for the police to remove and list or inventory property found on the arrestee's

raise it at the suppression hearing. Nonetheless, the court discussed and dismissed both arguments raised by the state. 99 Ill. App. 3d at 833-35, 425 N.E.2d at 1385-86.

604. 103 S. Ct. at 2608. See *South Dakota v. Opperman*, 428 U.S. 364 (1976). In *Opperman*, the Supreme Court upheld the search of the glove compartment in a car impounded by the police. *Id.* at 376. The Court found that the search was reasonable because it served legitimate governmental interests that outweighed the individual's privacy interests in the contents of the automobile. These measures served to protect the owner's property while it was in police custody and to protect the police against possible false theft claims. *Id.* at 369.

605. 103 S. Ct. at 2608. See *South Dakota v. Opperman*, 428 U.S. at 370 n.5 ("[t]he probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations"). In *United States v. Chadwick*, 433 U.S. 1 (1977), the Court stated that "[t]his is so because the salutary functions of a warrant simply have no application in that context; the constitutional reasonableness of inventory searches must be determined on other bases." *Id.* at 10 n.5.

606. See *United States v. Robinson*, 414 U.S. 218, 235 (1973) (full search of person incident to lawful custodial arrest is exception to warrant requirement of fourth amendment).

607. See *Chimel v. California*, 395 U.S. 752, 763 (1969) (it is reasonable to conduct search incident to arrest of arrestee's person and area into which arrestee might obtain weapon or evidence).

608. 103 S. Ct. at 2609. The Court noted that impractical, unreasonable, or embarrassingly intrusive searches can be more readily and privately performed at the station. For example, disrobing an arrestee should be performed at the station. *Id.*

609. *Id.* The standardized inventory assists in deterring false theft claims, theft of articles removed from the arrestee, and weapons concealed in "innocent-looking" containers. *Id.* The Court ruled that because of the need to protect against these risks, it is not important whether police suspicion is focused on any particular container. *Id.* See *United States v. Robinson*, 414 U.S. 218, 235 (1973), where the Court stated that:

[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.

Id. The *Lafayette* Court also noted that the inspection may assist in identifying the arrestee. 103 S. Ct. at 2610 (citing 2 W. LAFAVE, SEARCH AND SEIZURE § 5.3, at 306-07 (1978)).

person or in his possession.⁶¹⁰ The Court concluded that "every consideration of orderly police administration benefiting both police and the public points toward the appropriateness of the examination of [defendant's] shoulder bag prior to his incarceration."⁶¹¹

8. Dog sniffs

In *United States v. Spetz*,⁶¹² the Ninth Circuit upheld two separate dog sniff investigations at the Los Angeles Harbor.⁶¹³ On December 10th, customs inspectors ran narcotics-detecting dogs through a harbor container yard where goods are placed after removal from ships arriving from foreign ports.⁶¹⁴ The dogs alerted on two cargo containers. On December 12th, after one of the suspected containers had been devanned⁶¹⁵ and the individual van paks⁶¹⁶ had been placed in a container freight station, the inspectors again ran the dogs, which alerted on a large van pak. A subsequent search of the van pak, pursu-

610. 103 S. Ct. at 2609.

611. *Id.* at 2610. The Court noted that when it decided *South Dakota v. Opperman*, 428 U.S. 364 (1976), there was no need to consider the existence of less intrusive means of protecting the police and the property in their custody, such as locking the car and impounding it in safe storage under guard. 103 S. Ct. at 2610. In the present case, the Supreme Court similarly held that the existence of alternative "less intrusive" means of protecting the owner's property did not make the method actually employed unreasonable. *Id.* See *Cady v. Dombrowski*, 413 U.S. 433 (1973) (Court rejected notion that public could have been protected by posting guard over automobile). The *Lafayette* Court stated that, even if less intrusive means existed, "it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit." 103 S. Ct. at 2610. See also *New York v. Belton*, 453 U.S. 454 (1981). In *Belton*, the Supreme Court stated that "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

In a concurring opinion in *Lafayette*, Justice Marshall, joined by Justice Brennan, stated that he "seriously doubt[ed] that the search incident to arrest exception would justify the search of the bag. 103 S. Ct. at 2611 (Marshall, J., concurring). Justice Marshall offered three reasons for this. First, the officer did not feel that it was necessary to search the bag when he arrested Lafayette. Second, a search at the time of the arrest could not have been justified by a need to prevent the destruction of evidence as there was no evidence of the offense of disturbing the peace, for which Lafayette was arrested. Finally, although the bag might be seized because of a concern about weapons, this concern would not justify its subsequent search. *Id.* See *supra* note 603.

612. 721 F.2d 1457 (9th Cir. 1983).

613. *Id.* at 1463-64.

614. See *infra* note 622 and accompanying text.

615. "Devanning" is the process of removing the individual crates from the container. *Id.* at 1461 n.3.

616. A "van pak" is a shipping crate.

ant to a warrant, revealed 1440 pounds of marijuana.⁶¹⁷

The Ninth Circuit observed that it has held that dog sniffing of personal luggage constitutes an intrusion under the fourth amendment.⁶¹⁸ A dog sniff is not technically a search, however, that requires probable cause before it can be conducted.⁶¹⁹ The relatively minimal intrusion caused by a dog sniff instead requires an "articulable suspicion" that the item contains contraband or evidence.⁶²⁰

In *Spetz*, the Ninth Circuit declared that the "determining factor [in the December 10th canine sniff was] the location in which the sniffing occurred."⁶²¹ The court upheld this dog sniff, not on the basis of an articulable suspicion, but because customs officials are authorized to run dogs through a customs area where goods are placed after arriving from foreign countries.⁶²² The court upheld the December 12th dog

617. *Id.* at 1460-61.

618. *Id.* at 1463 (citing *United States v. Beale*, 674 F.2d 1327, 1335 (9th Cir. 1982), *vacated*, 103 S. Ct. 3529 (1983)) [hereinafter cited as *Beale I*]. In *Beale I*, the court held that a dog sniff is a limited intrusion which may be conducted without a warrant if based upon "founded" or "articulable" suspicion. 674 F.2d at 1335.

Beale I was vacated and remanded by the Supreme Court for reconsideration in light of *United States v. Place*, 103 S. Ct. 2637 (1983). In *Place*, the Supreme Court declared that the exposure of luggage, located in a public place, to a dog sniff did not constitute a search under the fourth amendment. *Id.* at 2644-45. This form of investigation was found to be so limited and minimally intrusive that it did not constitute a "search." *Id.* However, the Court held that the initial seizure of the defendant's luggage was unlawful; therefore, it affirmed the appellate court's reversal of the defendant's conviction. *Id.* at 2646.

On remand, the Ninth Circuit in *United States v. Beale*, 731 F.2d 590 (9th Cir. 1984) [hereinafter cited as *Beale II*], reaffirmed its holding in *Beale I* that a dog sniff examination requires reasonable articulable suspicion. *Id.* at 596. The *Beale II* court initially observed that the *Place* Court's declaration that dog sniff inspections are not "searches" was dictum. *Id.* at 593. Nonetheless, the Ninth Circuit did reconsider its decision in *Beale I* in light of *Place*.

Prior to deciding the dog sniff issue, the *Place* Court observed that the initial seizure of defendant's luggage required a showing of reasonable suspicion. 103 S. Ct. at 2644. Reading *Place*'s "not a search" statement "in the context of the entire decision in *Place*," the Ninth Circuit interpreted *Place* to merely conclude that once reasonable suspicion is established, "no additional suspicion is required to justify exposing luggage to a trained canine." 731 F.2d at 594. Thus, the *Beale II* court ruled that "[w]e do not believe that *Place* should be read to validate a canine sniff in the absence of the reasonable suspicion required for a minimally intrusive detention of luggage, whenever fortuity makes a canine sniff feasible without any seizure of the luggage." *Id.*

619. *Place*, 103 S. Ct. at 2644-45.

620. *Id.* at 2644; *Beale II*, 731 F.2d at 593-94. See *supra* note 618.

621. 721 F.2d at 1463.

622. *Id.* at 1463-64. The first dog sniff inspection was justified "[b]ecause 'mere entry alone into the United States from a foreign country is sufficient reason' for a search." *Id.* at 1463 n.13 (quoting *Klein v. United States*, 472 F.2d 847, 849 (9th Cir. 1973) (border search)). The court also noted that searches of arriving foreign goods have been justified by statutes and regulations, "whether or not there be any suspicion of illegality directed to the particu-

sniff because the first sniff created the founded or articulable suspicion that a specific van pak contained illegal drugs.⁶²³

9. The plain view doctrine

The plain view doctrine allows the warrantless seizure of an object where an officer has prior lawful access to the item under the fourth amendment.⁶²⁴ Three requirements have generally been required to invoke the doctrine. First, the officer must lawfully occupy the place from which he views the object to be seized.⁶²⁵ Second, the officer must "inadvertently" discover the incriminating evidence.⁶²⁶ Third, it must be "immediately apparent" to the police that the item observed may be evidence of a crime, contraband, or otherwise subject to seizure.⁶²⁷

In *Texas v. Brown*,⁶²⁸ the United States Supreme Court upheld the seizure of an opaque party balloon, later found to contain heroin, based upon its presence in plain view in an automobile.⁶²⁹ Shortly before midnight, police officer Maples stopped Brown's automobile at a routine drivers license checkpoint. Maples stood near the driver's window and shined his flashlight into the car as he asked Brown for his drivers license. Maples observed Brown remove from his pocket an opaque green party balloon, knotted near the tip. Brown dropped the balloon on the seat beside his leg as he reached across the passenger seat to open the glove compartment.⁶³⁰

Because of Maples' experience in drug-related offenses, he was aware that narcotics are frequently packaged in similar party balloons. Therefore, as Brown searched for his license in the glove compartment, Maples shifted his position outside the car for a better view. Maples saw plastic vials, loose white powder, and an open bag of party balloons in the glove compartment. At that point, Brown told Maples that

lar . . . thing to be searched." *Id.* at 1463-64 n.13 (quoting *United States v. Odland*, 502 F.2d 148, 151 (7th Cir.) (upheld inspection of incoming international mail), *cert. denied*, 419 U.S. 1088 (1974)).

623. *Id.* at 1464 (citing *Beale I*, 674 F.2d at 1335). See *supra* note 209.

624. *Texas v. Brown*, 103 S. Ct. 1535, 1540 (1983) (plurality opinion). The term "plain view," as used in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion), denotes the justification for the seizure of an object. That term must be distinguished from an officer simply observing an object left in plain view or plain sight, which generally does not constitute a search under the fourth amendment and may merely be the basis for probable cause or reasonable suspicion of criminal activity. 103 S. Ct. at 1541 n.4.

625. *Coolidge v. New Hampshire*, 403 U.S. at 465-68.

626. *Id.* at 469.

627. *Id.* at 466.

628. 103 S. Ct. 1535 (1983) (plurality opinion).

629. *Id.* at 1544.

630. *Id.* at 1538.

he did not have his license. Maples then ordered Brown out of the car. After Brown complied, Maples reached into the car and removed the green balloon, which seemed to contain a powder within its tied-off portion. Brown was then arrested. At the suppression hearing, a police chemist testified that the balloon contained heroin and that narcotics are frequently packaged in party balloons.⁶³¹

Brown was convicted of possession of heroin. The Texas Court of Criminal Appeals reversed Brown's conviction on fourth amendment grounds, rejecting the state's argument that the seizure was lawful pursuant to the plain view doctrine. The Supreme Court granted certiorari because of the uncertainty in the application of the plain view doctrine.⁶³²

The Supreme Court initially established that the plain view doctrine is not an independent "exception" to the fourth amendment,⁶³³ but merely an extension of the prior justification for an officer's "access to an object."⁶³⁴ The doctrine justifies the seizure of an item when an officer has prior lawful access to the object under the fourth amendment.⁶³⁵

The Court then applied the three requirements for plain view to the present case.⁶³⁶ First, the officer must have "prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused."⁶³⁷ The Supreme Court

631. *Id.* at 1538-39.

632. *Id.* at 1537-38. The Supreme Court did not address whether the seizure was justified under *New York v. Belton*, 453 U.S. 454 (1982) (warrantless search of automobile passenger compartment, incident to arrest), because the facts were not clear regarding the time at which Brown's arrest occurred, or the reason for the arrest—narcotics possession or failure to produce his driver's license. 103 S. Ct. at 1538-39 n.2.

633. The Court stated that the *Coolidge* plurality's characterization of the doctrine as an independent exception to the fourth amendment was inaccurate. 103 S. Ct. at 1540.

634. *Id.* at 1540-41. An officer must first justify his ability to occupy the area from which he observes the object. Usually this prior justification will be based upon the existence of a warrant or an exception to the fourth amendment. Once the officer is legally situated, any criminal evidence he sees in plain view may be seized, subject to the qualifications of *Coolidge*. *Coolidge*, 403 U.S. at 465-71.

635. 103 S. Ct. at 1540 (citing *Payton v. New York*, 445 U.S. 573, 586-87 (1980) ("The seizure of property [found in a public place] in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.")). The *Brown* Court distinguished between property that is in a public place and property that is in view but is "'situated on private premises to which access is not otherwise available for the seizing officer.'" 103 S. Ct. at 1540 (quoting *Payton v. New York*, 445 U.S. at 587 (quoting *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977))).

636. See *supra* notes 624-27 and accompanying text.

637. *Coolidge*, 403 U.S. at 466.

agreed with the Texas Court of Criminal Appeals that the initial automobile stop to check Brown's drivers license was valid.⁶³⁸

Next, the Court addressed the second requirement that the officer must "inadvertently" discover the incriminating evidence.⁶³⁹ The Court ruled that this requirement did not bar the seizure.⁶⁴⁰ The record did not indicate that the roadblock was a pretext to uncover narcotics violations, nor was there any evidence beyond a generalized expectation by the officers that some of the cars they stopped would contain narcotics.⁶⁴¹ Furthermore, nothing indicated that Maples believed that narcotics or paraphernalia would be found in Brown's automobile or glove compartment.⁶⁴²

The Texas Court of Criminal Appeals and the Supreme Court disagreed on whether the third requirement, that it must be "immediately apparent" to the police that the objects may be evidence subject to seizure, was satisfied.⁶⁴³ The appellate court reversed Brown's conviction because it found that this requirement was not fulfilled.⁶⁴⁴ The Supreme Court ruled that the third requirement was fulfilled after determining that Officer Maples possessed probable cause⁶⁴⁵ to believe

638. 103 S. Ct. at 1541 (citing *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979) (Court approved the "[q]uestioning of all oncoming traffic at roadblock-type stops" where the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field")). It is presumed that the *Brown* "routine driver's license checkpoint" fulfilled the requirement that a person's expectation of privacy not be subject to the officer's discretion.

The *Brown* Court further recognized that Officer Maples' use of the flashlight did not violate the fourth amendment. *Id.* (citing *United States v. Lee*, 274 U.S. 559, 563 (1927)). In *Lee*, the Court stated that "[t]he use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." 274 U.S. at 563. Nor did Maples' actions in changing position to allow him to see inside Brown's automobile violate the fourth amendment. The Court reasoned that because the public could peer into Brown's car from any angle, no legitimate expectation of privacy existed. 103 S. Ct. at 1542.

639. The second requirement may also be stated as follows: The police may not use the plain view doctrine as a pretense, "know[ing] in advance the location of [certain] evidence and intend[ing] to seize it." *Coolidge*, 403 U.S. at 470.

640. 103 S. Ct. at 1543. Justice White, concurring, stated that he disagrees with the *Coolidge* plurality that a valid plain view seizure requires "inadvertence." Justice White emphasized that the *Brown* majority did not "purport to endorse" the requirement of "inadvertence" in its opinion. *Id.* at 1544 (White, J., concurring).

641. *Id.* at 1543 (White, J., concurring).

642. *Id.* at 1543-44 (White, J., concurring).

643. *Id.* at 1542 (citing *Coolidge*, 403 U.S. at 466).

644. *Id.* The Supreme Court believed that the Texas Court of Criminal Appeals erroneously interpreted this requirement to mean that the officer must possess "near certainty" that the objects are seizable. *Id.*

645. The Court stated that the *Coolidge* Court's phrase "immediately apparent" was "very likely an unhappy choice of words," which could be interpreted as requiring an "unduly high degree of certainty as to the incriminatory character of evidence." *Id.* The Court determined that the standard required was probable cause. *Id.* (citing *Payton v. New York*,

that the party balloon contained an illicit substance.⁶⁴⁶ Because all three requirements were satisfied, the Court concluded that the seizure of the balloon was lawful under the fourth amendment.⁶⁴⁷

D. Warrantless Arrests

1. Terry stops

The concept of the "Terry stop" for investigative purposes originated in situations where police were making routine stops based on reasonable suspicion that a crime had been or was about to be committed.⁶⁴⁸ A Terry stop will be nonviolative of the fourth amendment if the stop and the questions asked are brief.⁶⁴⁹ A frisk for weapons will

445 U.S. 573, 587 (1980) ("The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.")).

The Court did not address the issue of whether a lesser degree of suspicion would support seizures in other cases. *Id.* at 1542 n.7.

646. Based upon his prior narcotics-related experience, Maples testified that balloons tied in a manner similar to the one in Brown's possession were often used to package narcotics. This information was corroborated by a police department chemist. Furthermore, the glove compartment's contents suggested illicit activity. The Court stated that "[t]he fact that Maples could not see through . . . the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer." *Id.* at 1543.

647. *Id.* at 1544. The seizure of the balloon involved a warrantless physical intrusion into the automobile. The Court found this to be lawful because the plain view doctrine requirements were satisfied. *Id.* at 1542 n.6 (citing *United States v. Ross*, 456 U.S. 798 (1982) (automobile exception to warrant requirement)).

Justices Stevens, Brennan, and Marshall, concurring, agreed that the seizure of the balloon was lawful. However, it was contended that the plurality did not sufficiently consider whether the balloon's contents could be used as evidence because it was opened by the state without a warrant. *Id.* at 1545 (Stevens, J., concurring). In the concurrence, it was argued that the balloon's contents must be excluded unless either of two situations justified the search of the balloon. *Id.* at 1547-48 (Stevens, J., concurring). The first situation is where Maples' observations of the glove compartment's interior, the defendant, and the contents of his pocket, provided probable cause to believe that narcotics were located somewhere in the car, and not merely in the single balloon at issue. In this situation, it would be permissible to search the contents of any container in the car, including the balloon. *Id.* at 1547 (Stevens, J., concurring) (citing *United States v. Ross*, 456 U.S. 798, 817-25 (1982) (automobile exception)).

The second situation is where an uninflated balloon, tied as in this case, has as its sole function the packaging of narcotics. A person would not have a reasonable expectation of privacy in such a container because its "contents can be inferred from [its] outward appearance." *Id.* at 1547 (Stevens, J., concurring) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 764-65 n.13 (1979) (examples of such containers are a burglary tool kit or a gun case)).

648. See *Terry v. Ohio*, 392 U.S. 1 (1968) (detective observed three men who appeared to be casing a store for a potential robbery).

649. *Dunaway v. New York*, 442 U.S. 200, 210-11 (1979).

be legal if there is reasonable suspicion that the suspect is armed.⁶⁵⁰

In *United States v. Smith*,⁶⁵¹ the Ninth Circuit addressed the legality of an initial stop of a defendant after he had been observed acting suspiciously in a parking lot from which several automobiles had recently been stolen.⁶⁵²

Smith was convicted of possessing burglary tools⁶⁵³ and of giving false information to a federal officer.⁶⁵⁴ He was stopped by park police officers just outside the park premises where he had fled after the officers spotted him crouching between two automobiles parked on federal property. Smith had been seen with one hand on a car door and the other hand holding a metal pipe.⁶⁵⁵

Smith contended that the stop was an arrest without probable cause and therefore the evidence seized by the officers must be suppressed.⁶⁵⁶ The facts surrounding the initial stop were as follows: (1) the officers identified themselves, and Smith was told to drop the metal pipe; (2) the officers frisked Smith briefly; (3) when asked his name, Smith gave a false name and claimed he had no identification; (4) when asked why he was in the area, Smith stated he was going to the museum, but there was no museum in the vicinity; and (5) when asked why he had ducked between the cars when spotted by the police, Smith ran away. The entire length of this detention was only forty to ninety seconds.⁶⁵⁷ As Smith ran from the officers, a long screwdriver fell from his clothes. Smith was arrested within two minutes.⁶⁵⁸

Smith's claim that the initial detention was an arrest without probable cause was countered by the government's claim that it was merely an investigative or *Terry* stop.⁶⁵⁹ Smith argued that, because he was not free to leave, the stop became an arrest. Because the court ac-

650. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

651. 713 F.2d 491 (9th Cir. 1983).

652. *Id.* at 492.

653. Smith was convicted under 18 U.S.C. § 13 (1976), the Assimilated Crimes Act which makes a state's criminal laws applicable to areas within its borders which are under federal jurisdiction if there is no federal rule governing that behavior. The applicable California rule is found in CAL. PENAL CODE § 466, which states in pertinent part: "Every person having upon him or in his possession a . . . tool with intent feloniously to break or enter into any . . . vehicle . . . is guilty of a misdemeanor."

654. 36 C.F.R. § 2.10.

655. 713 F.2d at 492.

656. *Id.* at 493.

657. *Id.* at 492.

658. *Id.* at 493.

659. *Id.* "Smith concede[d], as he must, that there were sufficient grounds for a *Terry* stop, and the Government concede[d] that there was no probable cause for an arrest." The disagreement was simply one of definition. *Id.*

knowledge that Smith was seized, the court stated that Smith's freedom of movement would only become relevant if the officers had exceeded the limits set forth in *Terry*, in which case an arrest would have occurred.⁶⁶⁰ The Ninth Circuit, in upholding the district court's decision, agreed with the government.⁶⁶¹

The court held that the stop was not converted into an arrest by the length, the detention or the type of questions asked. Additionally, the court found that the frisk was a reasonable protective measure prescribed by a *Terry* stop.⁶⁶²

In *Florida v. Royer*,⁶⁶³ the Supreme Court applied the *Terry* line of cases to the stop of a defendant attempting to board a New York bound plane at Miami International Airport.⁶⁶⁴ Royer attracted the attention of two narcotics officers because of the way he appeared and the type of luggage he was carrying. These characteristics were representative of the "drug courier profile."⁶⁶⁵ Unaware of the officers' observations, Royer bought a one-way ticket to New York with cash, at which time he checked in the two suitcases he was carrying. On each bag he placed an identification tag with the name "Holt" and the destination "La-Guardia" written on it.⁶⁶⁶

Royer was stopped by the officers as he was crossing the concourse, preparing to board the airplane. The officers identified themselves and Royer silently produced his drivers license and airline ticket upon request. The drivers license had the name "Royer" while the airline ticket said "Holt," the same name as appeared on the luggage.⁶⁶⁷

660. *Id.* The court noted that a person's subjective belief as to his freedom to walk away from authorities goes to the question of whether a seizure, as opposed to a voluntary stop, has occurred.

661. *Id.* at 494.

662. *Id.* Park officials have the authority to conduct such an investigation pursuant to 16 U.S.C. § 1a-6(a)(3) (1976) which allows officials to "conduct investigations of offenses against the United States committed in" the National Park System. *Id.*

663. 460 U.S. 491 (1983) (plurality opinion).

664. *Id.* at 493-94.

665. The "drug courier profile" is an abstract of characteristics found to be typical of persons transporting illegal drugs. In Royer's case, the detectives attention was attracted by the following facts which were considered to be within the profile: (a) Royer was carrying American Tourister luggage, which appeared to be heavy, (b) he was young, apparently between 25-35, (c) he was casually dressed, (d) he appeared pale and nervous, looking around at other people, (e) he paid for his ticket in cash with a large number of bills, and (f) rather than completing the airline identification tag to be attached to checked baggage, which had space for a name, address, and telephone number, he wrote only a name and the destination.

Id. at 493 n.2 (citation omitted).

666. *Id.* at 493.

667. When Royer was questioned about the discrepancy, he stated that the reservations had been made in the name "Holt" by a friend. *Id.* at 494.

Royer became increasingly nervous during this time, whereupon he was told by the officers that they were actually narcotics investigators and there was reason to suspect that he was transporting narcotics.⁶⁶⁸

Rather than return his drivers license and airline ticket, the investigators requested that Royer follow them to a nearby room. Royer silently complied with their request. One of the officers later described the room as a "large storage closet."⁶⁶⁹ Royer's baggage was retrieved from the airline by one of the officers using Royer's baggage check stubs. Royer had not consented to the retrieval.⁶⁷⁰

The baggage was brought back to the room where the officers asked Royer if he would give his consent to a search. Royer unlocked one of the suitcases without responding orally to their request. The officers opened and searched the suitcase without asking for further consent from Royer. Drugs were found.⁶⁷¹ Royer gave permission to the officers to break open the second suitcase after claiming he did not know the combination to the lock. The officers opened the bag and additional marijuana was found. At this time, Royer was told that he was under arrest. Fifteen minutes had elapsed since Royer had initially been stopped.⁶⁷²

Royer was convicted of felony possession of marijuana.⁶⁷³ He appealed his conviction, claiming that his motion to suppress the evidence found in his suitcases had been wrongly denied.⁶⁷⁴ The conviction was reversed by the Florida District Court of Appeal.⁶⁷⁵ That court held that Royer's involuntary confinement in the small room was without probable cause and exceeded the limitations on restraint established in *Terry*. Therefore, the court held that any consent to the search by Royer was invalid because it was "tainted" by his illegal confinement.⁶⁷⁶

The Supreme Court granted the state's petition for certiorari and affirmed the court of appeal reversal.⁶⁷⁷ However, prior to reviewing

668. *Id.*

669. *Id.* The "room" was located in the stewardesses' lounge and contained a small desk and two chairs.

670. *Id.*

671. *Id.*

672. *Id.*

673. FLA. STAT. § 893.1(1)(a)(2) (1975) states in pertinent part: "[I]t is unlawful for any person to . . . possess with intent to sell . . . a controlled substance. Any person who violates this provision with respect to: [marijuana] is guilty of a felony . . ."

674. 460 U.S. at 495.

675. 389 So. 2d 1007 (Fla. Dist. Ct. App. 1979).

676. 460 U.S. at 495.

677. *Id.* at 497.

the lower court's decision, the Supreme Court made several "preliminary observations" of its own.⁶⁷⁸

In the discussion of Royer's stop, the Court found that the validity of that stop would depend upon his consent, which must be freely given.⁶⁷⁹ Additionally, the Court discussed what would be required in this or any other detention to enable it to find that the detention, where consent was given, was reasonable. The Court held that fourth amendment guarantees would not be violated when a person is at all times free to leave.⁶⁸⁰ Furthermore, when there is reasonable suspicion under *Terry*, a brief detention is permissible if the purpose is the furtherance of a substantial public interest.⁶⁸¹ However, that detention, if for investigative purposes, must be brief and last no longer than necessary to complete the purpose for which the stop was initiated.⁶⁸² Any voluntary statements made during an illegal detention would be inadmissible if a product of that detention and not made independently.⁶⁸³ The Court concluded this discussion by stating that if Royer's detention had been reasonable under *Terry*, his voluntary consent would have validated the search of his luggage.⁶⁸⁴

Following these "preliminary observations," the Court announced its holding in the case. In stating the plurality opinion, the Court discounted the three reasons which the state had offered for reinstating Royer's conviction.⁶⁸⁵

First, the Court did not agree with the state's claim that Royer consented to the seizure and was therefore not held against his will. The Court held that the initial stop, where Royer relinquished his drivers license and airline ticket, was permissible. However, when the of-

678. *Id.* at 497-501.

679. *See, e.g.,* *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979) (consent by a clerk in an adult book store given "in the face of 'colorably lawful coercion' cannot validate . . . illegal acts").

680. *See, e.g.,* *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (defendant not seized where she had no objective reason to believe she was not free to leave).

681. Here, the public interest involved was the "suppression of illegal transactions in drugs." 460 U.S. at 489-99. *See Michigan v. Summers*, 452 U.S. 692, 699 (1981) ("some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial enforcement interests").

682. *See, e.g.,* *Terry v. Ohio*, 392 U.S. 1, 19 (1968) ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.") (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

683. *See, e.g.,* *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (defendants' statements excluded where found to be "'fruits' of . . . agents' unlawful action").

684. 460 U.S. at 501.

685. *Id.* at 501-07.

ficers revealed their status as Drug Enforcement Administration (DEA) agents and had Royer accompany them to the small room without notifying him that he was free to leave, Royer was seized as defined by the fourth amendment.⁶⁸⁶

Second, the state contended that the detention was justified by reasonable, articulable suspicion and that the detention never went beyond the limits of *Terry*.⁶⁸⁷ The Supreme Court did not agree. Although there was reasonable suspicion, based on the officers' initial observations, for the original detention, the Court held that when Royer was taken to the small room, and his luggage retrieved without his consent, Royer was no longer merely detained, but rather "[a]s a practical matter, Royer was under arrest."⁶⁸⁸

Additionally, the Court held that the conduct by the officers was more intrusive than what was necessary for an effective investigative detention. The Court could find nothing in the record which could explain how the original purpose of the detention was furthered by moving Royer to the room prior to attempting to gain his consent to search his luggage.⁶⁸⁹

The state's third argument, that there was probable cause to arrest Royer at the time his consent was given, was also rejected by the Court. The facts available to the officers at the time consent was given were "that a nervous young man with two American Tourister bags paid cash for an airline ticket to a 'target city.'"⁶⁹⁰ The Court could not agree with the state that probable cause to arrest Royer was present based on these facts. This would open the door for any person fitting

686. *Id.* at 501. The Court stated that "[t]hese circumstances surely amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'" *Id.* at 502 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1979)).

687. *Id.*

688. *Id.* at 503. "What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions." *Id.*

689. *Id.* at 505.

The Court set forth three ways in which the officers' conduct could have been reasonable: (1) by returning Royer's license and ticket and informing Royer that he was free to go; (2) by justifying Royer's removal for reasons of safety and security; and (3) by searching the baggage on the spot where Royer's consent was obtained and by searching it in a more expeditious manner, i.e., using trained dogs.

However, the Court did not wish to "suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure There will be endless variations in the facts and circumstances . . . that it is unlikely that the courts can reduce to a sentence . . . a rule that will provide unarguable answers" *Id.* at 506-07.

690. *Id.* at 507.

that description to be arrested on a similar felony charge.⁶⁹¹

The Supreme Court affirmed the Florida District Court of Appeal's decision that Royer's consent was ineffective because it was obtained in the midst of an illegal detention.⁶⁹²

In *United States v. Place*,⁶⁹³ the Supreme Court upheld a district court's application of the *Terry* standard⁶⁹⁴ to the detention of personal property. However, the Court affirmed the court of appeal's reversal of the district court's conviction,⁶⁹⁵ holding the seizure of the property exceeded the permissible limits of a *Terry* stop.⁶⁹⁶

In *Place*, the defendant was initially detained at Miami International Airport after he, Place, had aroused officers' suspicions while waiting in line to purchase a plane ticket to New York's LaGuardia Airport. Place presented identification and his airline ticket upon the officers' request, and, in addition, gave his consent to a search of his two suitcases. The officers decided against the search because Place's flight was about to depart.⁶⁹⁷

Because of Place's remark that he knew that they were police, the officers checked the luggage tags and found discrepancies between the

691. *Id.*

692. *Id.* at 507-08. Justices Powell and Brennan concurred in the result. Justice Brennan felt it was unnecessary for the Court to reach the issue of the legality of the initial stop where "the officers' subsequent actions clearly exceeded the permissible bounds of a *Terry* 'investigative' stop." *Id.* at 509 (Brennan, J., concurring).

In his dissent, Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, stated that the detention of Royer was reasonable given the legitimate governmental purpose and given the specific facts of this case. The dissent found the conduct of the officers eminently reasonable in that they moved Royer out of the busy airport concourse to more private surroundings, and retrieved his luggage so that it would not arrive at the intended destination without Royer there to pick it up. Justice Rehnquist also did not believe the size of the room should be determinative of reasonableness. *Id.* at 532 (Rehnquist, J., dissenting). He asked: "If the room had been large and spacious, rather than small, if it had possessed three chairs rather than two, would the officers' conduct have been made reasonable by these facts?" To Justice Rehnquist, the reasonableness of the detention depends on the specific facts of Royer's stop. According to the dissent, "[o]n this point the plurality stutters, fudges, and hedges." *Id.* at 529 (Rehnquist, J., dissenting).

Additionally, the dissent did not agree with the plurality where they stated that Royer's initial consent evaporated when he was under arrest in the room. Because there was no evidence of coercion, the dissent did not find the consent tainted. *Id.* at 531 (Rehnquist, J., dissenting).

693. 103 S. Ct. 2637 (1983).

694. *United States v. Place*, 498 F. Supp. 1217, 1227 (E.D.N.Y. 1980) ("If detention of a person can be based on reasonable suspicion, . . . there is no reason why detention of physical objects cannot be based on the same standard.").

695. *United States v. Place*, 660 F.2d 44 (2d Cir. 1981).

696. 103 S. Ct. at 2646.

697. *Id.* at 2639-40.

addresses on the tags and those Place had given.⁶⁹⁸ Based on this information and Place's comment, the Miami officers alerted DEA agents in New York who watched Place as he deplaned. The New York DEA agents became suspicious when Place called for a limousine after claiming his baggage. The agents approached Place who again commented that he had pegged them as "cops" as soon as he had gotten off the plane.⁶⁹⁹

Place was informed that, based on the information from the Miami authorities and on what the New York officers had observed, he was under suspicion of carrying narcotics. Place then claimed that he had been questioned and that his baggage had been searched in Miami. The DEA agents stated that this was not the information they had received.⁷⁰⁰ They then asked for Place's permission to search the luggage. Place refused. Instead, he relinquished his bags to the agents, who informed Place that they were taking the bags to a federal judge in order to obtain a search warrant. The agents gave Place a telephone number where they could be reached when he declined to accompany them.

The suitcases were then taken to New York City's Kennedy Airport, where a trained narcotics dog performed a "sniff test." The dog reacted positively to one of the suitcases. This test occurred approximately ninety minutes after the bags had been seized. Because it was late Friday by the time the test was performed, the agents kept the luggage until Monday morning when they obtained a search warrant for the bag singled out by the dog. When the bag was opened, the agents found 1,125 grams of cocaine.⁷⁰¹

Place pleaded guilty to possession of cocaine with intent to distribute,⁷⁰² but reserved his right to appeal the district court's denial of his motion to suppress the contents of his suitcase.⁷⁰³ His conviction was reversed by the Second Circuit Court of Appeals,⁷⁰⁴ who agreed with Place's contention that the seizure of his suitcase violated his

698. After investigating further, the officers discovered that the addresses did not exist. Furthermore, the phone number given to the airline by Place belonged to another address on the street listed on the luggage tags. *Id.* at 2640.

699. *Id.*

700. *Id.*

701. *Id.*

702. 21 U.S.C. § 841(a)(1) (1976) states in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally—to . . . possess with intent to . . . distribute . . . a controlled substance"

703. *See supra* note 694.

704. *See supra* note 695.

rights under the fourth amendment.⁷⁰⁵ The United States Supreme Court granted certiorari to determine the applicability of the *Terry* standard to warrantless seizures of a person's luggage.⁷⁰⁶

Traditionally, the Court has upheld the seizure of property prior to issuance of a search warrant if there are exigent circumstances or another exception to the warrant requirement present.⁷⁰⁷ The Court reasoned that the justification for these exceptions is that the risk of losing the luggage before it is searched outweighs the party's possessory interest. In *Place*, the Court found the rule in *Terry* to be an additional exception to the warrant requirement for the seizure of personal luggage.⁷⁰⁸

In applying the *Terry* standard, the Court balanced the government's strong interest in preventing the flow of narcotics⁷⁰⁹ against the intrusion into the fourth amendment rights of the individual.⁷¹⁰ The Court found that the balance tipped in favor of an investigative stop, provided, however, that it is within the limitations set regarding the scope of the detention.⁷¹¹

The Court held that the same standards applicable to the investigative detention of persons, those based on reasonable suspicion rather

705. "The Fourth Amendment protects the 'right of the people to be secure in their . . . effects, against unreasonable searches and seizures.'" 103 S. Ct. at 2641 (emphasis in original).

706. *Id.* at 2641-42. The Court was asked by the government "to apply the principles of *Terry v. Ohio* . . . to permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband."

Place also petitioned the Court to decide whether reasonable suspicion existed at the time of his detention. The Court denied certiorari as to this issue. *Id.* at 2640 n.1.

707. *Id.* at 2641. See, e.g., *Arkansas v. Sanders*, 442 U.S. 753, 761 (1979) (exception to warrant requirement present when police stop a vehicle and seize luggage which they reasonably suspect contains marijuana).

708. 103 S. Ct. at 2642.

709. *Id.* at 2643. "Because of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops . . . on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels." *Id.* (footnote omitted).

710. *Id.* at 2643-44. The Court examined both the nature and the extent of the intrusion, dismissing the defendant's argument that degrees of intrusion do not apply where a person's luggage is seized. Place unsuccessfully argued that when luggage is seized "dispossession is absolute," and the "substantially less intrusive" measurement of *Terry* has no application. *Id.* The Court held that the degree of intrusion can vary from where the owner has already given up control to a third party, *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (suspicious packages left at post office), to where the luggage is seized directly from the owner, as in this case. See also *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion).

711. 103 S. Ct. at 2644. See *Terry v. Ohio*, 392 U.S. 1, 28 (1968) ("The manner in which the seizure [was] conducted is . . . as vital a part of the inquiry as whether [it was] warranted at all.").

than on probable cause, are applicable to a stop of an individual's luggage.⁷¹² In *Place*, the Court held that the permissible limits set forth in *Terry* had been exceeded by the length of time the luggage had been detained.⁷¹³ The officers failed both in the lack of brevity of the seizure and in the absence of diligence in pursuing the investigation.⁷¹⁴ The Court stated that where the officers at LaGuardia had prior notice of Place's arrival, they had plenty of time to make the necessary arrangements for an on the spot investigation.⁷¹⁵ Because the Court found the seizure unreasonable under the fourth amendment, the evidence found in the suitcase was held to be inadmissible and, accordingly, the Court affirmed the reversal of Place's conviction.⁷¹⁶

2. Investigative stops—custodial interrogations

Cases involving border detentions, especially in the area of drug smuggling or the detention of suspected illegal aliens, have created special problems relating to the reasonableness of investigative stops and the legality of custodial interrogations.

Investigative or *Terry* stops⁷¹⁷ are brief, minimally intrusive, and

712. 103 S. Ct. at 2645. The Court rejected the suggestion made by the government that the probable cause requirement should be triggered much later where luggage is being detained rather than an individual. "Particularly in the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." *Id.*

713. *Id.* The luggage was initially detained for ninety minutes to facilitate the dog sniff and then, as it was Friday afternoon, it was kept until Monday morning at which time a warrant was obtained. *Id.* at 2640.

714. *Id.* at 2645.

715. *Id.* The Court also stated that the unreasonableness of the seizure "was exacerbated" by the agents' conduct in failing to give the defendant accurate information regarding the location of his baggage and the length of time it would be detained. *Id.* at 2646.

716. *Id.*

Justices Brennan and Marshall concurred in the result but did not agree with the majority's need "to decide the constitutional issues involved in this case on a broader basis than the record before [it] imperatively require[d]." *Id.* (Brennan, J., concurring).

According to Justice Brennan, the officers violated Place's fourth amendment rights at the moment his luggage was seized where the seizure was based on less than probable cause. *Id.* at 2650 (Brennan, J., concurring). Additionally, in Justice Brennan's view, "dog sniffs of people constitute searches." *Id.* at 2651 (Brennan, J., concurring).

Justice Blackmun, with whom Justice Marshall joined, concurred in the result but voiced his concern with "what appears . . . to be an emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable." *Id.* at 2652 (Blackmun, J., concurring).

717. *Terry v. Ohio*, 392 U.S. 1 (1968). The requirement of reasonable suspicion applies equally here as it does in other detentions. See, e.g., *United States v. Burnette*, 698 F.2d 1038 (9th Cir.) (reasonable suspicion required when suspect was detained following a robbery), *cert. denied*, 103 S. Ct. 2106 (1983).

usually involve only a few questions.⁷¹⁸ Such brief detentions have been found to be nonviolative of traditional probable cause requirements where there is a governmental interest of significant proportion involved.⁷¹⁹ Custodial interrogations are detentions or investigative seizures.⁷²⁰ Because these detentions are more severe intrusions upon protected rights, they require the safeguards traditionally associated with lawful arrests.⁷²¹

These definitions are particularly important, yet difficult to apply, when the courts are required to decide when an investigative stop has blossomed into a custodial interrogation or a full blown arrest, in which case fourth amendment protections would be required.⁷²²

a. generally

Prior to an actual arrest, officers may briefly stop an individual for the purpose of investigating the possibility of criminal activity although probable cause is not present for an actual arrest.⁷²³ The permissibility

718. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

719. *Id.* at 881. *Brignoni-Ponce* concerned the regulation of illegal aliens. *See also* *Terry v. Ohio*, 392 U.S. 1 (1968) (police officers may briefly detain suspects while investigating criminal activity).

720. 392 U.S. at 19 n.16.

721. *Dunaway v. New York*, 442 U.S. 200, 216 (1978).

722. The fourth amendment to the United States Constitution guarantees "[t]he right of people to be secure in their persons." U.S. CONST. amend. IV. This has been interpreted as requiring "that searches and seizures be founded upon an objective justification" *United States v. Mendenhall*, 446 U.S. 544, 551 (1980).

In *United States v. Wilson*, 690 F.2d 1267 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 205 (1983), the Ninth Circuit gave a brief interpretation of the difference between an investigative stop and a custodial interrogation. In *Wilson*, the defendant had been stopped and asked to identify himself, whereupon he produced two pieces of false identification. Following production of the identification, Wilson was told that "unless he could better identify himself, they [the officers] would have to detain him." *Id.* at 1274. *Miranda* warnings were not given and, therefore, the court held that statements made by Wilson at this point were inadmissible. *Id.*

The court found that the initial request for identification occurred during an investigative stop. This stop did not trigger fourth amendment protections as long as "questioning does not occur in police-dominated or compelling atmosphere." *Id.* However, the statements made following the production of the identification were inadmissible. The court held that these statements were made during a custodial interrogation. "A 'custodial interrogation' occurs, for purposes of triggering the requirement of a *Miranda* warning, when . . . officers initiate questioning after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* *See* *Miranda v. Arizona*, 384 U.S. 436 (1966).

On the facts presented in *Wilson*, the court held that it appeared that "Wilson's freedom was significantly restricted," therefore, as the requisite *Miranda* warnings were not given, the statements made during that time should not be admitted. 690 F.2d at 1274.

723. *Terry v. Ohio*, 392 U.S. 1 (1968).

of this brief detention is based on the officer's "reasonable" or "founded" suspicion that there may be criminal activity afoot.⁷²⁴ Founded suspicion⁷²⁵ has been defined as those specific facts, combined with inferences based on those facts, that would reasonably justify a suspicion that the individual detained has committed or was about to commit a crime.⁷²⁶

In *United States v. Burnette*,⁷²⁷ the Ninth Circuit rejected a defendant's claim that police officers lacked founded suspicion to detain her following a bank robbery.⁷²⁸ The bank had been robbed by a black man who was observed entering an automobile occupied by two black persons.⁷²⁹

Approximately one hour following the robbery, the getaway car was discovered at a nearby inn. Two black females, Lynette and Theresa Burnette, were spotted near the car. Lynette appeared to be wiping off the driver's door, while her co-defendant, Theresa, appeared to be removing the license plate from the rear of the car. The court stated that from the officers' observations it could be reasonably inferred that Lynette was in some way connected with the car.⁷³⁰

Additional factors establishing founded suspicion were the officers' observations of the two women fleeing into a room at the inn after they had spotted one of the police officers. Shortly thereafter, a black man fitting the robber's description ran from the room into an alley. Lynette was seized as she was attempting to leave the inn.⁷³¹ The court held that the police officers' knowledge of the bank robbery, together with their observations of the defendants' suspicious behavior at the inn, constituted the founded suspicion necessary to make the detention of Lynette reasonable.⁷³²

Subsequent to Lynette's detention, the officers requested photo identification. Lynette's reluctance to comply with the request, together with her furtive manner, convinced the officers that she was

724. *United States v. Burnette*, 698 F.2d 1038, 1047 (9th Cir.) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)), *cert. denied*, 103 S. Ct. 2106 (1983).

725. "Founded suspicion is identical to 'reasonable' suspicion." *Id.* at 1047 n.16.

726. *Id.* at 1047.

727. *Id.* at 1038.

728. *Id.* at 1046. The defendant's conviction as to the armed portion of the offense of bank robbery was reversed on other grounds.

729. *Id.* at 1047.

730. *Id.*

731. *Id.*

732. *Id.* See also *United States v. Collum*, 614 F.2d 624 (9th Cir. 1979) (police officers had founded suspicion to detain suspects after officers were alerted to a possible auto theft and discovered suspects stooping next to missing car), *cert. denied*, 446 U.S. 923 (1980).

about to flee and therefore Lynette was placed under arrest.⁷³³ The officers once again requested identification, but instead seized Lynette's purse when she attempted to block their view as she took a small black object from the purse. The court held that the evidence seized from the purse was properly admitted.⁷³⁴ The court found that where founded suspicion for the detention had ripened into probable cause to arrest, the purse was properly seized pursuant to that arrest.⁷³⁵

The requirement of founded suspicion is also present where roving patrols stop vehicles in border areas when alien smuggling is suspected.⁷³⁶ This standard of founded suspicion is identical to that applied in the *Burnette* case where the defendant was detained following a bank robbery. However, the facts known to the officers must reasonably justify suspicion that the vehicle contains illegal aliens.⁷³⁷

In *United States v. Garcia-Nunez*,⁷³⁸ the defendant appealed his conviction for transporting illegal aliens,⁷³⁹ claiming that the officers were without the necessary founded suspicion which would justify the stop.⁷⁴⁰

In affirming the conviction, the Ninth Circuit listed all the information received by the officers from third parties, and the observations by the officers themselves, which together provided the necessary founded suspicion.⁷⁴¹ The factors considered were: (1) an anonymous

733. 698 F.2d at 1048.

734. The evidence included a large sum of money and money orders. *Id.* at 1048 n.21.

735. *Id.* at 1048.

736. *United States v. Garcia-Nunez*, 709 F.2d 559, 561 (9th Cir. 1983).

737. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). Facts which may be considered include illegal traffic patterns, information about recent illegal border crossings, erratic driving, attempts to escape or a heavily laden car. *United States v. Avalos-Ochoa*, 557 F.2d 1299, 1302 (9th Cir.), *cert. denied*, 434 U.S. 974 (1977).

738. 709 F.2d 559 (9th Cir. 1983).

739. 8 U.S.C. § 1324(a)(2) (1976) states in pertinent part: "Any person . . . who . . . transports . . . any alien . . . shall be punished . . ."

8 U.S.C. § 1324(a)(3) (1976) states in pertinent part: "Any person . . . who . . . willfully or knowingly conceals . . . any alien . . . shall be punished . . ."

18 U.S.C. § 371 (1976) states in pertinent part: "If two or more persons conspire . . . to commit any offense against the United States . . . [they] shall be fined . . . or imprisoned . . ."

740. 709 F.2d at 560. Co-defendant Benson was also convicted of conspiracy to "conceal and transport undocumented aliens" and additionally of "aiding and abetting Garcia-Nunez in the transportation of an undocumented alien." Benson's conviction for aiding and abetting was reversed when the Ninth Circuit, agreeing with Benson, held that there was insufficient admissible evidence to support that conviction. *Id.*

741. *Id.* at 561. Prior to listing the facts which constituted probable cause in this case, the court cited *United States v. Patterson*, 492 F.2d 995 (9th Cir.), *cert. denied*, 419 U.S. 846 (1974). Relying on *Patterson*, the court stated that officers, in assessing the presence of founded suspicion, "need not rule out all possibility of innocent behavior." 709 F.2d at 561.

tip implicating the defendant's car in alien smuggling and giving the location of the car at the home where the defendant was spotted;⁷⁴² (2) a neighbor's complaint that Mexican-looking men were standing by the car exchanging money; and (3) a subsequent report from the same neighbor that the men had entered the home mentioned earlier. Further, the officers observed that: (4) a man from the house was apparently surveying the neighborhood by driving continuously around the block; (5) the defendant exited from the house presumably acting as a lookout; (6) upon a signal from the lookout, four men hurried from the home to the suspect's car; (7) the defendant was driving the car identified in the tip while the men in the back seat were sitting low; (8) the men in the back seat "appeared" to be illegal aliens as evidenced by their dress, demeanor, and appearance;⁷⁴³ and (9) the men riding in the back seat were of Mexican descent.⁷⁴⁴

The Ninth Circuit concluded that these facts were sufficient to give the officers the necessary founded suspicion to stop the automobile.⁷⁴⁵ Upon stopping the car, the passengers were asked about their citizenship and they admitted to being illegally present in the country.⁷⁴⁶ The defendant and his passengers were subsequently arrested.

In *United States v. Doe*,⁷⁴⁷ founded suspicion was held to be present when border patrol agents stopped a juvenile driving a car which officers suspected was transporting illegal aliens.⁷⁴⁸ The defendant's car had been seen riding high southbound on a route commonly used by illegal aliens hoping to avoid a border checkpoint. A few minutes

Founded suspicion may exist even though a suspect's activities, looked at one at a time, may appear perfectly innocent. In *Patterson*, the Ninth Circuit had stated that "[t]he succession of superficially innocent events [may proceed] to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one." 492 F.2d at 997. In *Garcia-Nunez*, some of what the officers observed may have appeared perfectly innocent, but there was enough activity to warrant the officers' suspicion. 709 F.2d at 561.

742. 709 F.2d at 561. Anonymous tips may be taken into consideration in assessing founded suspicion. See, e.g., *United States v. Avalos-Ochoa*, 557 F.2d 1299, 1302 (9th Cir.), cert. denied, 434 U.S. 974 (1977).

743. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("[T]rained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.").

744. 709 F.2d at 561. "Mexican appearance [is] a relevant factor . . ." *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975).

745. 709 F.2d at 561.

746. *Id.* at 560.

747. 701 F.2d 819 (9th Cir. 1983).

748. *Id.* at 821. The defendant was attempting to suppress evidence obtained from the stop of his car. When the car was stopped, six illegal aliens from Mexico were found inside the vehicle.

later, the car was again spotted, this time headed north, heavily laden.⁷⁴⁹

The court, relying on several earlier decisions involving similar factual patterns,⁷⁵⁰ held that the stop of the defendant's car was lawful based on the facts known to the agents at the time of their decision to pull the car over.⁷⁵¹ The commonly used route and the low-riding car were sufficient to constitute founded suspicion necessary for the stop.⁷⁵² The court stressed that in determining the existence of founded suspicion only those facts known to the officers prior to the stop may be taken into consideration.⁷⁵³

However, in an actual arrest without a warrant, the Ninth Circuit may allow facts accumulated after the arrest order to be considered when determining if there was probable cause to make the arrest. In *United States v. Manuel*,⁷⁵⁴ the defendant appealed his conviction of second degree murder. One of his contentions was that his arrest was illegal because it had been ordered before the arresting officers had probable cause to support a belief that he, Manuel, was one of the parties responsible for the slaying.⁷⁵⁵

The murder was investigated by both Federal Bureau of Investigation agents and Tribal Police because the body was found on an Indian Reservation. Prior to the detention of Manuel, the officers gathered information regarding the slaying. They obtained a statement from the uncle of the victim who claimed he had stabbed Manuel after Manuel had admitted committing the murder.⁷⁵⁶ Further evidence of the crime was gathered by searching the area where the murder occurred and by interviewing witnesses at the scene.⁷⁵⁷

Manuel contended that the tribal police officer had ordered his arrest prior to obtaining any of the evidence from the scene or from the

749. *Id.* at 820-21.

750. See *United States v. Roberts*, 470 F.2d 858, 859 (9th Cir. 1972) ("[T]he route is one frequently used by those transporting aliens . . . [and] [t]he rear seemed to be riding low . . ."), *cert. denied*, 413 U.S. 920 (1973); *United States v. Bugarin-Casas*, 484 F.2d 853, 854 (9th Cir.) ("That particular stretch of Interstate 8 was known by the agents to be an area with a high incidence of transportation of 'illegal' aliens . . . [T]he car was 'riding low . . .'"), *cert. denied*, 414 U.S. 1136 (1974).

751. 701 F.2d at 821.

752. *Id.* When Doe was spotted northbound, he disregarded the agents' red lights and sped up the highway. After he crashed into a concrete wall, he was caught as he was trying to flee on foot. *Id.*

753. *Id.* (citing *United States v. Morrison*, 546 F.2d 319, 320 (9th Cir. 1976)).

754. 706 F.2d 908 (9th Cir. 1983).

755. *Id.* at 911.

756. *Id.* at 910.

757. *Id.*

witnesses.⁷⁵⁸ Manuel was arrested the day after the arrest was ordered but the officers chose not to question him until twenty-four hours later when he sobered up.⁷⁵⁹ Prior to questioning, Manuel was given his *Miranda* rights and he subsequently confessed to his role in the murder.⁷⁶⁰ Because the district court record did not contain the necessary factual findings on this contention, the Ninth Circuit was unable to rule on Manuel's claim regarding the premature arrest order.⁷⁶¹

At the time of Manuel's arrest, the only evidence known to the officers was the location of the body, the results of an autopsy, and the hearsay statement from the uncle of the decedent.⁷⁶² The Ninth Circuit was unable to decide if this evidence was sufficient to constitute probable cause.⁷⁶³ However, the court did not believe that a determination of probable cause was necessary. Regardless of whether there was probable cause when the arrest was ordered, sufficient evidence was gathered by the officers shortly after their arrival to justify the arrest.⁷⁶⁴ Finally, because of the sufficiency of this evidence, Manuel's confession was held to be admissible although his initial arrest may have been illegal.⁷⁶⁵

In *Bernard v. City of Palo Alto*,⁷⁶⁶ the plaintiff was arrested without a warrant and released fifty-one hours later without a magistrate ever having determined whether probable cause existed for the arrest.⁷⁶⁷

758. *Id.* at 911.

759. *Id.* at 910.

760. *Id.*

761. The district court had ruled that the admissibility of evidence in a federal prosecution could not be affected by the illegality of a tribal arrest. The Ninth Circuit did not agree. "[T]hough Indian tribal governments are to be viewed as 'separate sovereigns' from the federal government akin to states for purposes of criminal procedure issues, . . . statements obtained by state officials in violation of the fourth amendment may not be used in a subsequent federal prosecution." *Id.* at 911 n.3 (citations omitted).

762. *Id.* at 911.

763. The court stated that the probable cause determination would turn on the credibility and reliability of the hearsay claimant. *Id.* at 911. In a footnote, the court disclaimed any intention of suggesting that probable cause did not exist in this case. Here, the uncle's statements were claimed to be based on personal knowledge and his story was corroborated by the findings of the autopsy. "[The court's] discussion [was] meant only to show the presence of an issue we need not decide . . ." *Id.* at 911 n.4.

764. *Id.* at 911. The most important evidence obtained was the eyewitness statements. *Id.*

765. *Id.* at 912. The court distinguishes *Manuel* from *Brown v. Illinois*, 422 U.S. 590 (1975), and *Dunaway v. New York*, 442 U.S. 200 (1979), where the Supreme Court had suppressed confessions which had been obtained "by exploitation of the illegality of [the] arrest." *Dunaway v. New York*, 442 U.S. at 217. In *Manuel*, "probable cause was amply established before the officers began their interrogation." 706 F.2d at 911-12.

766. 699 F.2d 1023 (9th Cir. 1983) (per curiam).

767. *Id.* at 1024. The Ninth Circuit held that a reasonable detention to complete the

The defendants claimed that probable cause for Bernard's arrest was established by the discovery of several outstanding warrants. These warrants were not discovered until after the plaintiff was arrested.⁷⁶⁸ The Ninth Circuit did not decide whether or not this discovery, subsequent to Bernard's arrest, constituted probable cause, as this case involved a class action suit.⁷⁶⁹ Because Bernard was found to adequately represent the class and therefore the suit was to go forward, his individual claim would not dispose of the class action and was not decided.⁷⁷⁰

b. alien detentions

In *Benitez-Mendez v. Immigration and Naturalization Service*,⁷⁷¹ the Ninth Circuit dealt directly with the question of when the stop of a suspected illegal alien "rises to the level of a 'seizure' under the Fourth Amendment."⁷⁷² Upon finding a seizure occurred, the court applied a standard which had previously been formulated to deal with the constitutionality of detentions for the purpose of questioning workers of suspected illegal alienage.⁷⁷³

In *Benitez-Mendez*, the petitioner was detained in a Border Patrol car after an initial questioning in the open field where he had been working. Officers had questioned Benitez-Mendez regarding his status in the United States. He answered that he had papers in his car which proved his legal status as an alien. The officers then detained the petitioner in their patrol car while these documents were examined.⁷⁷⁴

administrative details incident to an arrest should be no more than twenty-four hours. *Id.* at 1025. Under the defendant city's procedures, the probable cause determination was to be made within forty-eight hours. *Id.* at 1024. However, several officers testified to the fact that no more than eight to ten hours were required to book an arrestee under the worst conditions. *Id.* Therefore, the court held that given the maximum time of ten hours required, twenty-four hours was more than enough time within which to require a probable cause hearing to be held. *Id.* at 1025.

768. *Id.* at 1026.

769. The class action suit was brought by Bernard to challenge the city's policies of detaining arrestees for an unreasonably long period of time. *See supra* note 767.

770. *Id.* at 1026.

771. 707 F.2d 1107 (9th Cir. 1983).

772. *Id.* at 1108.

773. *Id.*

Relying on *United States v. Mendenhall*, 446 U.S. 544 (1980), the Ninth Circuit, in *United States v. Anderson*, 663 F.2d 934 (9th Cir. 1981), announced the test to be used in determining under what factual circumstances the activity of law enforcement officers would rise to the level of a seizure under the fourth amendment. The *Anderson* test states: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 663 F.2d at 939 (quoting *Mendenhall*, 446 U.S. at 554).

774. 707 F.2d at 1108.

Although the court stated that the initial stop in the field did not amount to a seizure, it held that when the petitioner was placed in the patrol car, he had been seized under the test established in *United States v. Anderson*.⁷⁷⁵ Having established that Benitez-Mendez had been seized, the court proceeded to determine whether the seizure was legal. In order to justify the seizure, the Border Patrol must have been able to articulate objective facts providing reasonable suspicion that the petitioner was illegally in the country.⁷⁷⁶

The court did not find the required objective facts to justify the seizure of the petitioner.⁷⁷⁷ The knowledge held by the officers at the time of the seizure consisted only of the fact that Benitez-Mendez was working in a field, that his co-workers had fled at the sight of the patrol car, that Benitez-Mendez was an alien, and that he claimed possession of documents which would prove his legal status.⁷⁷⁸ The court therefore did not believe that the officers had sufficient grounds to suspect Benitez-Mendez to be of illegal alienage at the time he was seized.⁷⁷⁹

c. border detentions

Intrusions by the government on the mobility of its citizens at international borders have been traditionally reviewed under different standards by the courts than other investigatory techniques employed by law enforcement personnel.⁷⁸⁰ Congress has conferred the authority to search for contraband at borders by way of a federal statute.⁷⁸¹ The Ninth Circuit has interpreted this grant of power as authorizing deten-

775. *Id.* See *supra* note 773 for *Anderson* test. "Once petitioner was placed inside the vehicle and told to wait, it [was] clear that he reasonably 'would have believed that he was not free to leave.'" 707 F.2d at 1108 (citing *Anderson*, 663 F.2d at 939).

776. 707 F.2d at 1109. In determining whether such objective facts exist, the Ninth Circuit follows the standard established in *ILGWU v. Sureck*, 681 F.2d 624 (9th Cir. 1982), *rev'd sub nom.* *INS v. Delgado*, 104 S. Ct. 1958 (1984). Under this standard, officials may not detain workers unless they have "objective facts providing [them] with a reasonable suspicion that each [individual] . . . is an alien illegally in this country." 681 F.2d at 638.

777. 707 F.2d at 1109.

778. *Id.*

779. *Id.* Benitez-Mendez also contended that because the information used at this deportation hearing was obtained during his illegal arrest, it should have been inadmissible at that hearing. The court agreed, having recently found the exclusionary rule applicable to deportation hearings in *Lopez-Mendoza v. INS*, 705 F.2d 1059, 1075 (9th Cir. 1983), *rev'd*, 52 U.S.L.W. 5190 (1984).

780. *United States v. Erwin*, 625 F.2d 838, 841 (9th Cir. 1980) (citing *Shorter v. United States*, 469 F.2d 61, 63 (9th Cir. 1972), *cert. denied*, 411 U.S. 918 (1973)).

781. 19 U.S.C. § 482 (1976) states in pertinent part: "Any . . . officers . . . may stop, search and examine . . . any vehicle, . . . or person on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law."

tions and searches by officials at borders that are not based on probable cause but based on reasonable suspicion alone.⁷⁸²

This type of analysis was applied by the Ninth Circuit in *United States v. Faherty*.⁷⁸³ Facts sufficient to meet the standard of reasonable suspicion were found by the court to exist for Faherty's initial detention and strip search.⁷⁸⁴ Following the strip search, which proved to be unproductive, the court held that Faherty's further detention was legal despite the absence of probable cause.⁷⁸⁵

Faherty was convicted of importing and possessing heroin.⁷⁸⁶ She was initially detained upon her arrival from Thailand, considered a source country.⁷⁸⁷ At this initial detention, Faherty was subjected to a strip search which produced no contraband.⁷⁸⁸ While detained, Faherty disclosed that she was self-employed. Customs agents became suspicious of Faherty's overly friendly attitude and her restricted body movements. The agents discovered a name in her notebook of a person suspected of drug smuggling. Further suspicion was aroused by Faherty's unusual travel arrangements and her chilliness and sleepiness.⁷⁸⁹

Following the nonproductive strip search, the customs officials continued to detain Faherty while an order was obtained to conduct an x-ray search. The court did not distinguish this time from the initial detention during which Faherty was searched. Although the court did not designate this part of the detention as an actual arrest, it did discuss the absence of the probable cause requirements usually mandated by the fourth amendment in a detention of this type not occurring at a border.⁷⁹⁰

782. *Shorter v. United States*, 469 F.2d at 61, 63 (9th Cir. 1972), *cert. denied*, 411 U.S. 918 (1973).

783. 692 F.2d 1258 (9th Cir. 1982).

784. *Id.* at 1260.

785. *Id.*

786. 21 U.S.C. § 952(a) (1981) states in pertinent part: "It shall be unlawful to import . . . into the United States . . . any controlled substance . . ."

21 U.S.C. § 844(a) (1981) states in pertinent part: "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . ."

787. 692 F.2d at 1259.

788. *Id.* The Ninth Circuit has previously held that a strip search requires reasonable suspicion. *See United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970) (reasonable suspicion is defined as "objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a . . . person . . . is concealing something on his body . . .").

789. 692 F.2d at 1259-60. Faherty traveled to Thailand with a ticket bought through a travel agent in Chicago. Her return flight necessitated an overnight stop in San Francisco.

790. *Id.* *See, e.g., Benitez-Mendez v. INS*, 707 F.2d 1107 (9th Cir. 1983) (suspected illegal

The Ninth Circuit held that for searches by customs officials at borders, it is not required by the fourth amendment that there be a warrant or probable cause.⁷⁹¹ Where probable cause is not required, the reasonableness of the detention will be judged by the length of time the suspect is held. The court stated that so long as the length of the detention is no longer than reasonably necessary for a valid search to be conducted, the detention of persons for border searches will not require a warrant or probable cause.⁷⁹²

A case very similar to *Faherty* was presented to the Ninth Circuit in *United States v. Couch*.⁷⁹³ Couch had been indicted for importing and possessing cocaine with the intent to distribute.⁷⁹⁴ His motion to suppress evidence obtained during his detention at Los Angeles Airport was granted by the district court,⁷⁹⁵ and the government appealed.

Couch was detained following his arrival from Peru at Los Angeles International Airport by DEA agents. The detention was based on information they received from an informant who had a reputation for reliability.⁷⁹⁶ The information supplied to the agents included the manner in which the drugs would be smuggled, the week during which several individuals would return to the United States, and finally, that

alien detained in patrol car while police checked his immigration papers—probable cause required).

791. 692 F.2d at 1260.

792. *Id.* Faherty, who was held at the airport for six hours, claimed that she was detained longer than reasonably necessary to obtain an order to conduct the x-ray search. *Id.* The court was faced with a similar claim in *United States v. Ek*, 676 F.2d 379 (9th Cir. 1982), where a defendant had been detained ten to twelve hours while a search order was being sought. *Id.* at 382.

In *Ek*, the Ninth Circuit held that a ten to twelve hour detention was reasonable given the time consuming procedures involved in obtaining a search order. *Id.* In *Faherty*, the Ninth Circuit, focusing on the requirement of reasonableness as the substitute criteria for probable cause, relied upon *Ek* in finding that a six hour detention was also not unreasonable. 692 F.2d at 1260. In order to defeat the finding of reasonableness, Faherty would have had to produce evidence that the government intentionally delayed obtaining the x-ray order. *Id.* Because no such evidence was produced "to suggest that the government did not move as expeditiously as possible," the detention was legal and Faherty's conviction was affirmed. *Id.*

793. 688 F.2d 599 (9th Cir. 1982).

794. 21 U.S.C. § 952(a) (1981). See *supra* note 786 for statutory language.

21 U.S.C. § 960(a)(1) (1981) provides in pertinent part: "Any person who—
... knowingly ... imports ... a controlled substance ... shall be punished."

21 U.S.C. § 841(a)(1) (1981) states in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally to ... possess with intent to ... distribute ... a controlled substance ..."

795. 688 F.2d at 600.

796. *Id.* Although there was no disclosure of the basis of the informant's information, the court held that "the detail in the ... tip was sufficient to establish a 'clear indication' of body cavity smuggling." *Id.* at 606.

Couch would refuse to allow an x-ray examination as he had done several months earlier when he had been detained in Peru. The informant stated that Couch would claim that he had been overexposed to x-rays at an earlier time and that he was afraid of any further exposure.⁷⁹⁷

Couch and another individual⁷⁹⁸ were moved to a secondary area where Couch's person and baggage were searched. The agents found no narcotics and no indicia of smuggling. Couch then refused to consent to an x-ray search of his stomach, explaining his previous overexposure to x-rays and his fear of further damage to his health.⁷⁹⁹ This initial detention presented no constitutional issues for the court.⁸⁰⁰ Relying on a prior Supreme Court case,⁸⁰¹ the Ninth Circuit held that routine border searches are permissible without probable cause.⁸⁰²

Couch was then removed to the DEA office and detained for approximately nine hours while a court order for an x-ray examination was obtained. During this detention, Couch was constantly watched, he was not allowed any phone calls, and he was aware that he was not free to leave.⁸⁰³ Couch was asked several routine questions, to which he reiterated his fear of x-rays and gave a false employment history regarding his alleged overexposure. During this time, Couch refused to eat or drink.⁸⁰⁴

Couch contended that the detention in the DEA office was an arrest requiring probable cause.⁸⁰⁵ Couch's argument rested on the dis-

797. *Id.* at 600. The informant had stated that the drugs would be smuggled into the country in the individuals' stomachs.

798. Robert Ek was detained at the same time as Couch. They were tried separately and Ek's pretrial suppression motion was denied. Another panel of the Ninth Circuit affirmed the denial of the motion as well as Ek's conviction. *United States v. Ek*, 676 F.2d 379 (9th Cir. 1982). It appeared to the *Couch* court that although Ek was detained separately, the circumstances surrounding his detention were similar to Couch's. 688 F.2d at 601 n.3. *See supra* note 792.

799. 688 F.2d at 601.

800. *Id.* at 602.

801. *United States v. Ramsey*, 431 U.S. 606 (1977).

802. 688 F.2d at 602. In *Ramsey*, the Court stated "[t]hat searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

803. Couch was given his *Miranda* rights, but agents refused Couch's request for an attorney. The agents believed that Couch was asking for an attorney to be appointed, while Couch claimed he was merely asking for permission to contact one. 688 F.2d at 601 and n.2.

804. *Id.* at 601.

805. *Id.* at 602. Additionally, Couch claimed that because his detention was based on an informant's tip, the warrant should have been prepared prior to his arrival at the airport. *Id.* at 603. The court dismissed this claim because it was not convinced that preparing a warrant ahead of time would have been preferable. *Id.* at 603-04. Some of the informant's tips could not be verified until Couch actually arrived in Los Angeles. Further, Couch may have

inction previously made by the Supreme Court in *Dunaway v. New York*⁸⁰⁶ between brief investigative stops and custodial interrogations which trigger the probable cause requirement. The Ninth Circuit did not find this distinction controlling. Couch's detention was for the purpose of obtaining a search warrant, whereas the arrests that concerned the Supreme Court in *Dunaway* were ones in which suspects were detained for the explicit purpose of eliciting information.⁸⁰⁷ Instead, the court used an analysis similar to that employed in *United States v. Faherty*.⁸⁰⁸ Because government agents are given broad discretion at borders,⁸⁰⁹ the standard applied must be that which has been developed specifically for border searches.⁸¹⁰

In *Couch*, the original search of the defendant's person and luggage revealed nothing. Therefore, the defendant claimed that he was detained in order for the officers to obtain additional evidence before the warrant was issued rather than merely to await the administrative details associated with procuring a warrant.⁸¹¹

The court did not agree that Couch's detention was unreasonable even though the earlier search had produced no evidence of smuggling.⁸¹² The court found that Couch's detention was reasonable in light of the border search standard previously established.⁸¹³ The court acknowledged that a detention pending a warrant would be more reasonable if the initial search had produced evidence of smuggling.⁸¹⁴

changed his plans or perhaps consented to the x-ray search, which would have made a warrant unnecessary. *Id.* at 604.

806. Couch cited *Dunaway v. New York*, 442 U.S. 200 (1979), in which a suspect had been detained at the police station for interrogation. The Court held that this type of custodial interrogation was illegal as it was an arrest without probable cause. *Id.* at 212-13.

807. "*Dunaway* stressed that the objectionable feature of the suspect's detention was custodial interrogation . . ." 688 F.2d at 602.

808. 692 F.2d 1258 (9th Cir. 1982).

809. See *supra* text accompanying note 782.

810. 688 F.2d at 602. This special standard was developed and applied by the Ninth Circuit in *United States v. Erwin*, 625 F.2d 838 (9th Cir. 1980). In *Erwin*, the court held that a detention was reasonable where the purpose of the detention was to obtain a search warrant. Erwin had been detained by customs agents who had become suspicious after observing her restricted body movements. Her baggage was searched and evidence was found which indicated body cavity smuggling. *Id.* at 840. Erwin refused to give her permission for a strip search and was detained while an order was prepared. *Id.*

811. 688 F.2d at 603.

812. This holding is consistent with its holding in *Faherty*, where the initial search was also unproductive. See text accompanying note 785.

813. 688 F.2d at 603.

814. See, e.g., *United States v. Erwin*, where "items" found in defendant's suitcase led customs agents to believe defendant was attempting to smuggle something in a body cavity. 625 F.2d 838, 840 (9th Cir. 1980).

However, the Ninth Circuit was unwilling to give Couch more protection simply because his method of concealment, swallowing the capsules, was more effective than other smuggling methods.⁸¹⁵

In the prior cases, the defendants were detained as they entered the United States from a drug source country. In the following case, the borders crossed by the defendant were only state borders, not international. Had the defendant entered from a foreign country, the analysis applied in *Faherty* and *Couch* would be appropriate.

In *United States v. Prim*,⁸¹⁶ the Ninth Circuit reversed the lower court's ruling⁸¹⁷ and held that a detention was unconstitutional where agents continued to hold the defendant, without probable cause, after he refused to consent to a search.⁸¹⁸

Prim had been initially observed at Portland International Airport by DEA agents whose suspicions were aroused by Prim's furtive behavior. Following his departure on a plane bound for Hawaii, the agents checked and found Prim's name mentioned in a 1979 drug investigation. This information was communicated to agents in Hawaii and Prim was detained shortly after he deplaned in Hawaii.⁸¹⁹ The Hawaiian agents also had knowledge, communicated to them by agents in Portland, of an outstanding nonsupport warrant for Prim. However, no mention of the warrant was made to Prim when he was stopped.⁸²⁰

Prim did not question the validity of the initial detention.⁸²¹ He was asked to accompany the agents and was then led to the DEA office.⁸²² However, shortly after arriving at the office, Prim was moved to an adjoining interrogation room where he twice refused to consent to a search. Following Prim's refusals, he was ordered to empty his pockets whereupon an agent performed a pat-down search for weapons. The agent felt an envelope, later found to contain cocaine, and directed the

815. 688 F.2d at 603.

816. 698 F.2d 972 (9th Cir. 1983).

817. The defendant was convicted for possession of cocaine in violation of 21 U.S.C. § 844 (1981). See *supra* note 786 for statutory language.

818. 698 F.2d at 977.

819. *Id.* at 973-74.

820. *Id.* at 974. The agents in Hawaii testified that, although they were aware of the warrant, the reason they detained the defendant was their suspicion of his trafficking in narcotics.

The Ninth Circuit disapproved of the trial court's reliance on the warrant as justification for probable cause to arrest. It believed that this was after the fact justification because the nonsupport warrant was not the cause of the officers' actions. The Ninth Circuit stated that "[s]uch pretextual use to justify an arrest or search has been clearly recognized as violative of the fourth amendment." *Id.* at 975.

821. *Id.*

822. *Id.* at 974.

defendant to remove it. The defendant removed the envelope from his pocket and placed it on the table.⁸²³

Unlike *Faherty*⁸²⁴ and *Couch*,⁸²⁵ the purpose of relocating Prim to the interrogation room was not to obtain a search warrant. One of the arresting officers testified that the true purpose was for interrogation and to obtain Prim's consent to a search.⁸²⁶

The district court found that Prim had not voluntarily consented to accompany the agents to the DEA office. Therefore, the court rejected the government's argument that because Prim initially agreed to accompany the officers to the office, the relocation should not constitute an arrest.⁸²⁷

Because consent was lacking, the Ninth Circuit relied on the standard set in *Dunaway v. New York*,⁸²⁸ where a detention for the purpose of custodial interrogation was held to violate the fourth amendment protections against illegal arrest.⁸²⁹ The Ninth Circuit held that when officers continued to detain Prim after his refusal to give his consent for a search, it was a custodial interrogation requiring probable cause.⁸³⁰ The evidence obtained from the pat-down search was therefore tainted by the illegal arrest and could not be admitted.⁸³¹

823. *Id.* The court found that the purpose of the pat-down search was not in fact to search for weapons, but rather to search for narcotics because none of the arresting officers suspected that Prim was armed. If the agents had suspected that Prim was armed, a pat-down search should have been conducted immediately upon coming into contact with Prim. *Id.* at 977. Therefore, the court held that the pat-down search exceeded the "permissible scope of a weapons search" and that the envelope should be suppressed. *Id.*

824. 692 F.2d 1258 (9th Cir. 1982).

825. 688 F.2d 599 (9th Cir. 1982).

826. 698 F.2d at 974.

827. *Id.* at 975-76. The government cited *United States v. Mendenhall*, 446 U.S. 544 (1980), where a passenger was relocated to a DEA office following an initial stop as she deplaned. The Supreme Court found that there was sufficient evidence to support a finding that the defendant voluntarily accompanied the officers. As there was no finding of consent in *Prim*, *Mendenhall* was not appropriate where "the Court was not addressing the issue of whether there was sufficient cause for the relocation, absent consent." 698 F.2d at 976.

828. 442 U.S. 200 (1979). See *supra* note 806.

829. 442 U.S. at 216.

830. 698 F.2d at 977. See also *United States v. Chamberlin*, 644 F.2d 1262, 1266 (9th Cir. 1979) (officers, wishing to question suspect, detained him for twenty minutes in the back of a police car; found to be a custodial interrogation).

831. 698 F.2d at 977.

In his concurrence, Judge Hug agreed with the majority's finding that the detention was a custodial interrogation without probable cause and, therefore, the evidence was illegally obtained. *Id.* at 978 (Hug, J., concurring). Judge Hug also rejected an after-the-fact justification for the search based upon the nonsupport warrant. *Id.* (Hug, J., concurring). Judge Alarcon, in his dissent, agreed with the district court's finding that the outstanding nonsup-

3. Arrests

Law enforcement officers may arrest suspects without a warrant, if at the time of the arrest, the arrest is supported by probable cause.⁸³² Probable cause will exist if, at the time the stop is made, the officers have within their knowledge reasonably trustworthy information, together with facts and circumstances which would justify a "prudent man" in believing that the arrestee was involved in a crime.⁸³³ The following cases presented situations where initial stops were made prior to an arrest. The defendants in these cases claimed that an actual arrest was made illegally, in that it was made without probable cause.⁸³⁴

In *United States v. Lomas*,⁸³⁵ the Ninth Circuit held that the facts supported a finding of probable cause in an arrest of two defendants following a drug investigation.⁸³⁶ In *Lomas*, the defendants were arrested after drug enforcement officers observed them in the vicinity of a car known to have been used in a drug conspiracy.⁸³⁷ The car had been rented by one of the defendants and had been followed by officers to its final destination at the bank where the defendants were arrested.⁸³⁸ Based on the agents' belief that the defendants were canvassing the area around the bank looking for the presence of police officers, and the belief that the defendants were connected with the car, the court found that there was probable cause to arrest.⁸³⁹ The court also considered the agents' belief⁸⁴⁰ that one of the defendants was checking the dashboard of an unmarked DEA car to see if it had the type of radio

port warrant was sufficient to justify probable cause for the detention. *Id.* at 978-79 (Alarcon, J., dissenting).

832. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

833. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

834. "Founded suspicion may ripen into probable cause to arrest . . . through the occurrence of after-the-stop facts and incidents." *United States v. Avalos-Ochoa*, 557 F.2d 1299, 1303 (9th Cir.), *cert. denied*, 434 U.S. 974 (1977).

835. 706 F.2d 886 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 720 (1984).

836. *Id.* at 895.

837. *Id.* at 889.

838. On the day of the arrest, the defendants had driven the car to the Hilton Inn where a briefcase was removed from the truck by another individual suspected of involvement in the drug deal. Two males were then observed in the car as it followed other suspects in a van as it proceeded to the bank. *Id.* at 899.

839. *Id.* at 892.

840. The court stressed that the beliefs of experienced agents must be weighed differently than those of the "ordinary lay person." *Id.* What appears innocent to the inexperienced eye may carry an "entirely different [message] to the . . . trained observer." *Id.* (quoting *United States v. Bernard*, 623 F.2d 551, 560 (9th Cir. 1979) (citations omitted)). *See also* *United States v. Thornton*, 710 F.2d 513, 515 (9th Cir. 1983) ("An officer's experience may be considered in determining probable cause.").

usually identified with law enforcement.⁸⁴¹ The court held that these observations and beliefs were sufficient to justify a "prudent man's" belief that these defendants were involved in the crimes under investigation.⁸⁴²

In *United States v. Thornton*,⁸⁴³ the Ninth Circuit upheld a lower court ruling that a police officer had probable cause to arrest where observations by the officer led him to believe that the defendant was in violation of the Idaho concealed weapons statute.⁸⁴⁴ In *Thornton*, the arresting officer approached the defendant's car which was parked partially blocking a traffic lane.⁸⁴⁵ Upon reaching the car, the officer found the defendant apparently asleep or unconscious behind the wheel and observed eight inches of the altered stock of a gun sticking out from beneath the front seat of the car.⁸⁴⁶

The defendant argued that probable cause to arrest did not exist under the concealed weapons statute since the stock of the gun was in plain view.⁸⁴⁷ The Ninth Circuit agreed with the district court's interpretation of Idaho law. The district court had held that, because a gun stock need not be part of a gun, a gun could be concealed even if the stock were visible.⁸⁴⁸ The Ninth Circuit held that an officer could also reasonably conclude that Idaho law would be violated where a gun was being carried with just its stock visible.⁸⁴⁹

Finally, the district court found that the officers were warranted in their belief that a gun was present by the amount of the gun stock which was visible.⁸⁵⁰ The Ninth Circuit held that, considering the experience of the officer, his belief that the statute was being violated was sufficient to constitute probable cause to arrest.⁸⁵¹

841. 706 F.2d at 892.

842. *Id.*

843. 710 F.2d 513 (9th Cir. 1983).

844. *Id.* at 515. IDAHO CODE § 18-3302 (1979) states in pertinent part: "If any person . . . shall carry concealed upon or about his person, any . . . gun . . . within the limits or confines of any city . . . or on public highways within the state of Idaho; . . . he shall, upon conviction, be punished"

845. 710 F.2d at 514.

846. *Id.*

847. *Id.* at 515.

848. *Id.* The court also disagreed with the defendant's argument that because the officer did not specifically know that defendant illegally possessed the gun, the officer lacked probable cause to arrest. *Id.* The court stated that "[p]robable cause does not require specific evidence of every element of an offense." *Id.* (citing *Adams v. Williams*, 407 U.S. 143, 149 (1972)).

849. *Id.*

850. *Id.*

851. *Id.* See *supra* note 840.

4. Exceptions to the probable cause requirement

The United States Supreme Court has carved out an exception to the probable cause requirement for warrantless arrests where legitimate government interests outweigh the public's expectation of privacy.⁸⁵² Law enforcement personnel have often attempted to apply this exception in cases involving the stopping of automobiles.⁸⁵³

In *United States v. Munoz*,⁸⁵⁴ the Ninth Circuit applied the Supreme Court's balancing test but did not find an exception to the probable cause requirement where patrols were stopping all vehicles within an area of a national park. In *Munoz*, a roving patrol routinely stopped the defendant's truck to check compliance with woodcutting regulations. Subsequently, the patrol officers discovered that the defendant had in his possession a dead golden eagle in violation of the Eagle Protection Act.⁸⁵⁵ The court held that these roving vehicle stops violated the defendant's fourth amendment rights and reversed his conviction.⁸⁵⁶

In reversing the conviction, the court balanced the government's interest in park management and resource preservation against the public's interest in freedom from unreasonable intrusions by the government.⁸⁵⁷ In weighing the public's right to privacy, the court considered both objective and subjective intrusions by the government.⁸⁵⁸ Objectively, the court found the intrusion only slight,⁸⁵⁹ because the invasion caused by the stop, questioning, and visual inspection was minimal. However, the court found the subjective intrusion, the gener-

852. *Delaware v. Prouse*, 440 U.S. 648 (1979).

853. *Id.* at 653-55 (policeman stopped automobile to check driver's license and car registration, subsequently discovered marijuana). See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975) (border patrol stopped automobile because "three occupants appeared to be of Mexican descent," and subsequently discovered respondent was transporting two illegal aliens).

In both *Brignoni-Ponce* and *Prouse*, the Supreme Court found the exception inapplicable. The Court was "not convinced that the legitimate needs of law enforcement require [that] degree of interference with lawful traffic." *Id.* at 883.

854. 701 F.2d 1293 (9th Cir. 1983).

855. 16 U.S.C. § 668(a) (1976) states in pertinent part: "Whoever, . . . without being permitted to do so . . . shall knowingly . . . possess . . . any golden eagle . . . shall be fined . . . or imprisoned . . ."

856. 701 F.2d at 1301.

857. *Id.* at 1297-301.

858. *Id.* at 1297 (citing *Delaware v. Prouse*, 440 U.S. 648, 656-57 (1979); *United States v. Watson*, 678 F.2d 765, 767 (9th Cir.) (subjective intrusion not unduly burdensome as Coast Guard took steps to reduce concern or fright before boarding ship), *cert. denied*, 459 U.S. 1038 (1982)).

859. *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) ("The intrusion is modest.")).

ation of fright and apprehension on the part of the traveler, too great to subordinate to the governmental interest.⁸⁶⁰

The government argued that the privacy interest held by persons visiting national parks is similar to the privacy interest held by persons involved in "pervasively-regulated industries."⁸⁶¹ The Ninth Circuit rejected this argument for several reasons. First, part of the purpose envisioned by Congress when establishing national parks was to preserve a peaceful and reflective setting for the public.⁸⁶² Second, warrantless intrusions of this type must be expressly authorized by statute.⁸⁶³ Lastly, while the purpose of intrusions into regulated industries is to correct or prevent conditions which may be harmful, the stop of Munoz's truck was to detect the possibility of criminal activity.⁸⁶⁴ The court concluded that the anxiety produced by the roving stops increased the subjective intrusion felt by the public beyond the level which could be justified by any governmental interest.⁸⁶⁵

In balancing the government's interest, the court noted that there were alternatives available which would be less intrusive. For example, questionnaires could be distributed at the entrances and exits of parks.⁸⁶⁶ The court was also not convinced that the government's primary interests were served at all by the roving patrol.⁸⁶⁷ The court held that because the primary purpose of the stop was to detect criminal activity, the stop "must be based on individualized suspicion."⁸⁶⁸ Although the exception for "pervasively-regulated" industries substitutes for probable cause in some situations, a national park is not such an industry. Where the governmental interest is to protect the national

860. *Id.* at 1301.

861. *Id.* at 1297. In such industries, the subjective intrusion is slight. *See, e.g.,* *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) where the warrantless search of a mine was upheld because the mine was part of the heavily regulated mining industry. The Court stated that "[t]he greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home." *Id.* at 598.

862. 701 F.2d at 1298.

863. *Id.* at 1299 (citing *Balelo v. Baldrige*, 724 F.2d 753 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3536 (1984)).

864. *Id.* at 1300.

865. *Id.* The court stated this to be true regardless of whether the stops were randomly or universally applied.

866. *Id.* Although questionnaires may not give information of park misuse, witnesses often will report misuse they observe.

867. *Id.* at 1301.

868. *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) ("officers on roving patrol may stop vehicles only if they are aware of specific articulable facts . . . that reasonably warrant suspicion"))).

park, it is insufficient to outweigh the public's right to enjoy the park without arbitrary stops.⁸⁶⁹

E. Warrantless Seizures

1. Automobiles

The United States Supreme Court has held that a warrantless seizure of an automobile is not unreasonable if: (1) there is probable cause that the automobile is being used for illegal purposes; and (2) there are circumstances surrounding the seizure which make it impractical to obtain a warrant beforehand.⁸⁷⁰ This exception also extends to vehicles other than automobiles.⁸⁷¹

In *United States v. Spetz*,⁸⁷² the Ninth Circuit was presented with the warrantless seizures of a Mercedes and a Datsun pickup truck.⁸⁷³

869. *Id.* Although Munoz's conviction was reversed, the court did express its dislike for this particular defendant. In its opinion, the Ninth Circuit quoted Justice Frankfurter's dissent in *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting), where he said:

It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment.

870. *United States v. McCormick*, 502 F.2d 281, 287 (9th Cir. 1974) (citing *Carroll v. United States*, 267 U.S. 132 (1925)). These cases are exceptions to the general rule that warrantless seizures are *per se* unreasonable under the fourth amendment.

871. *Carroll v. United States*, 267 U.S. 132, 153 (1925) (besides automobiles, the exception embraces ships, motor boats and wagons).

872. 721 F.2d 1457 (9th Cir. 1983).

873. The seizure of a Mercedes was also at issue in *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983). The owner of the automobile claimed that the car was illegally seized in connection with a drug investigation. The day before the seizure, the car had been searched and cocaine found. *Id.* at 446. The owner was not the driver at the time the cocaine was discovered. A warrant was issued for seizure of the car based on two pre-sentencing reports from prior prosecutions prepared regarding the driver of the vehicle. The car's owner claimed that these reports were illegally obtained and, therefore, the seizure of the Mercedes was tainted. *Id.* at 450.

The court held that an illegal seizure by itself does not protect the car from forfeiture. The Ninth Circuit stated "that forfeiture may proceed if the Government can satisfy the requirements for forfeiture with untainted evidence." *Id.* Since the cocaine was not seized in violation of the owner's fourth amendment rights, the court did not need to decide if the owner's claim had merit. Here, the cocaine was "sufficient untainted evidence to establish probable cause for forfeiture of the automobile." *Id.*

The owner also contended that the court lacked jurisdiction where the jurisdiction is based on improperly seized property. *Id.* The court rejected this argument citing *United States v. One 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (9th Cir. 1974) (*per curiam*). In the *Harley-Davidson* case, the Ninth Circuit had previously held that there is no validity to the argument that "an object illegally seized cannot in any way be used . . . as the basis for an *in rem* jurisdiction." *Id.* at 351.

Both vehicles were seized in conjunction with an investigation by the Drug Enforcement Administration (DEA).

The Mercedes was first spotted by DEA agents who were stationed at a freight terminal waiting to see who would arrive to claim a package known to contain marijuana. A beeper was planted in the package and would go off if the package was opened.⁸⁷⁴ Defendant Gulino arrived at the terminal in the Mercedes. A Ford truck driven by a hired driver arrived simultaneously. The package was loaded into the Ford. The vehicles had traveled approximately thirty-five miles when Gulino parked the Mercedes and joined the driver of the Ford. They then proceeded to a residence approximately two miles further down the street. Before Gulino got into the truck, he placed a briefcase in the trunk of the Mercedes.⁸⁷⁵

The DEA agents had watched the residence for about one-half hour when the beeper was triggered. The agents moved in to make the arrests. Defendant Spetz was spotted attempting to get away in a Datsun truck which had been parked next to the Ford truck containing the marijuana. The Datsun was stopped and Spetz was arrested. Gulino was also arrested on the scene.⁸⁷⁶

Following the arrests, the agents obtained the keys to the Mercedes from Gulino, having previously told him that the car was to be forfeited. The briefcase was removed from the trunk for "safekeeping" and the car was taken to a DEA office.⁸⁷⁷

Later that same evening, when the agents returned to the house with a search warrant, they also returned with the keys to the Datsun truck which they had obtained from Spetz. Spetz had been identified as the owner of the truck. When the truck was seized, a "bulging tarpaulin" that agents had observed earlier in the back of the truck⁸⁷⁸ was removed and 400 pounds of marijuana was discovered.⁸⁷⁹

Spetz and Gulino appealed their convictions of conspiring to distribute and of possessing marijuana.⁸⁸⁰ They argued that the district

874. 721 F.2d at 1461. The contents of the package had been established several days earlier pursuant to a valid search warrant. The beeper placed in the package "beeps once every five seconds until disturbed at which point it beeps more rapidly." *Id.* at n.8.

875. *Id.* at 1462.

876. *Id.*

877. *Id.* at 1463.

878. *Id.* at 1462.

879. *Id.* at 1463.

880. 21 U.S.C. § 846 (1976) states in pertinent part: "Any person who . . . conspires to commit any offense defined in this subchapter is punishable . . ."

21 U.S.C. § 841(a)(1) (1976) states in pertinent part: "[I]t shall be unlawful for any

court had erred when it denied their motions to suppress the evidence found in the back of the Datsun and in the briefcase found in the trunk of the Mercedes.⁸⁸¹

Gulino contended that the forfeiture of the Mercedes was illegal because the car was seized without a warrant. The Mercedes was seized pursuant to Title 21, section 881(a)(4) of the United States Code⁸⁸² which allows the government to seize vehicles suspected of transporting drugs. Under subsection (b)(4) of section 881, the seizure of the property to be forfeited must be accompanied by a warrant except where there is probable cause to believe that the property has been involved in illegal activity.⁸⁸³

After noting the differing ways in which other circuits handle the warrant provision of section 881(b)(4),⁸⁸⁴ the Ninth Circuit held that section 881(b)(4) seizures are governed by the constitutional standard requiring a warrant.⁸⁸⁵ If conducted without a warrant, the seizure is "per se unreasonable." However, there are specific exceptions to this rule.⁸⁸⁶

Accordingly, the government claimed that the seizure of the Mercedes fell under the automobile exception found in *Carroll v. United States*.⁸⁸⁷ The government based their claim on the fact that the DEA agents had no prior knowledge regarding the Mercedes and also because the car was parked on a public thoroughfare and could have been driven away by an accomplice of the defendant without much difficulty.⁸⁸⁸ The Ninth Circuit did not agree.⁸⁸⁹ It noted that in a recent

person knowingly or intentionally to . . . possess with intent to . . . distribute . . . a controlled substance."

881. 721 F.2d at 1461. They also sought to suppress evidence seized when DEA agents searched the residence.

882. 21 U.S.C. § 881(a)(4) (1976) states in pertinent part: "The following shall be subject to forfeiture to the United States and no property right shall exist in them . . . [a]ll . . . vehicles . . . which are used . . . to transport [controlled substances]."

883. 721 F.2d at 1469 n.19 (quoting 21 U.S.C. § 881(b)(4) (1976)). Section 881(b)(4) states in pertinent part: "[S]eizure without such process may be made when—the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter." 21 U.S.C. § 881(b)(4) (1976).

884. 721 F.2d at 1469. See, e.g., *United States v. Bush*, 647 F.2d 357 (3d Cir. 1981) (warrantless seizure permitted on probable cause and the presence of exigent circumstances).

885. In *Spetz*, the court stated that "[a]lthough automobiles are inherently mobile, '[t]he word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears.'" 721 F.2d at 1471 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971)).

886. *Id.* at 1470 (citing *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974) where the court found these same principles applicable to a similar forfeiture statute).

887. 267 U.S. 132 (1925).

888. 721 F.2d at 1470.

Supreme Court case,⁸⁹⁰ the Court had restated the reasoning behind the automobile exception.⁸⁹¹ Following this reasoning, the Ninth Circuit stated that the applicability of the exception is found most frequently in a situation where a moving automobile is detained and there is probable cause to suspect that there is contraband contained within.⁸⁹²

The court found neither of the two factors present in the seizure of the Mercedes.⁸⁹³ The Mercedes was parked at the time of the seizure and there were no exigent circumstances present which would make agents believe that anyone other than Gulino, who was already in custody, would move the car.⁸⁹⁴ Second, there was no reason for agents to believe that the car contained any contraband.⁸⁹⁵ The only thing that agents had observed was a briefcase being placed in the trunk.

As to the Datsun truck, Spetz argued that the agents lacked the probable cause required for a forfeiture under section 881(b)(4) when the vehicle was seized.⁸⁹⁶ The court did not agree. Under the exception found by the Supreme Court, the Datsun could be forfeited without a warrant if there was probable cause to believe that contraband was being carried in the Datsun.⁸⁹⁷ The court found probable cause present here. The truck was of a type which could transport contraband. Although that alone is not sufficient for a forfeiture, this truck was near an area where marijuana had been present, the tarpaulin could reasonably be thought to be concealing contraband, and Spetz had fled in the truck when he spotted the DEA agents.⁸⁹⁸ These factors provided the probable cause.⁸⁹⁹

Spetz also argued that even if probable cause did exist, there were

889. *Id.*

890. *United States v. Ross*, 456 U.S. 798 (1982).

891. In *Ross*, the Court stated:

Thus, since its early days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods. It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable.

Id. at 806-07.

892. 721 F.2d at 1471.

893. *Id.*

894. *Id.* at 1472.

895. *Id.* at 1472-73.

896. *Id.* at 1474. See *supra* note 883.

897. 721 F.2d at 1474. See *supra* note 887.

898. 721 F.2d at 1475.

899. *Id.*

no exigent circumstances present which would justify a warrantless seizure of the truck.⁹⁰⁰ Here, the Ninth Circuit stated that the automobile exception did apply.⁹⁰¹ The court found the two factors necessary for the application of the auto exception.⁹⁰² The agents had probable cause to believe that there was contraband contained in the Datsun truck, and the vehicle was "in transit" when seized by the agents.⁹⁰³ Therefore, the court held that the warrantless forfeiture seizure was valid, and the subsequent search, which turned up over 400 pounds of marijuana, was lawful.

2. Ships

In *United States v. Kaiyo Maru No. 53*,⁹⁰⁴ the Ninth Circuit held that a warrantless seizure of a tuna boat met the requirements of the *Carroll* exception.⁹⁰⁵ The boat had been seized by the United States Coast Guard after a routine investigation exposed an illegal harvest. The court found the first factor of the *Carroll* exception present where the Coast Guard had direct knowledge of the illegal use.⁹⁰⁶ The second factor, exigent circumstances, was found in the fact that it would have been unreasonable to have the Coast Guard stay on board the boat awaiting a warrant when the other occupants of the boat were "potentially hostile."⁹⁰⁷ The court likened the tuna boat to an automobile which was still playing an active part in the unlawful activity when it was seized on a public roadway.⁹⁰⁸

900. *Id.*

901. *Id.*

902. See *supra* text accompanying note 892.

903. 721 F.2d at 1475. See *supra* text accompanying note 898.

904. 699 F.2d 989 (9th Cir. 1983).

905. *Id.* at 998.

906. *Id.* The Coast Guard boarded the boat pursuant to 16 U.S.C. § 1861(b) of the FISH-ERY CONSERVATION AND MANAGEMENT ACT of 1976. Under the Act, any authorized officer may board, search and seize any fishing boat where it reasonably appears that the boat is used in a manner which violates the Act. This may be done "with or without a warrant." The Ninth Circuit agreed with the district court's finding that Congress intended that "routine warrantless inspections or search and seizures [be] part of the enforcement scheme of the Act." The Ninth Circuit then proceeded to determine if this intention violated the fourth amendment. *Id.* at 993-94.

907. *Id.* at 998.

908. *Id.* (citing *United States v. Kimak*, 624 F.2d 903 (9th Cir. 1980)). The court distinguished *Kaiyo Maru* from *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974) where the seized automobile had been parked unused on a street for over two months. 699 F.2d at 997.

Following the seizure, an arrest warrant was issued promptly for the boat pursuant to FED. R. CIV. P. C (Supplemental Rules for Certain Admiralty and Maritime Claims) which states in pertinent part: "Upon a filing of the complaint the clerk shall forthwith issue a

F. Fruits of the Poisonous Tree

The "fruits of the poisonous tree" doctrine provides that secondary evidence obtained as a result of a violation of a defendant's constitutional rights is inadmissible.⁹⁰⁹ However, the Supreme Court has recognized certain exceptions to the doctrine. If evidence is obtained from two sources, only one of which was related to the original constitutional violation, the evidence is admissible under the "independent source" exception.⁹¹⁰ Evidence which would have been discovered by constitutionally approved methods had it not been first obtained through unlawful means is admissible under the "inevitable discovery" exception.⁹¹¹ Lastly, if sufficient factors intervene between the original illegality and the discovery of the evidence, the evidence is admissible under the "purged taint" exception, even though the evidence would not have been obtained "but for" the illegality.⁹¹²

warrant for the arrest of the vessel No notice other than the execution of the process is required."

Defendants claimed that the prompt issuance of the arrest warrant was unnecessary where the boat was already in the government's possession and therefore their due process rights to pre-arrest notice or hearing were violated. 699 F.2d at 999. The Ninth Circuit agreed that the "need for prompt action did not exist," but held that since the boat had already been seized, there was no further deprivation of property in violation of the defendants' due process rights. *Id.*

909. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

In *Silverthorne*, federal officers illegally seized and photographed documents belonging to a lumber company for use in a grand jury investigation. A federal court ordered the originals returned, but impounded the photographs. A subpoena was then issued to regain the originals. *Id.* at 390-91.

The Supreme Court held that the lumber company need not comply with the subpoena because it was issued on the basis of knowledge obtained by the illegal seizure of the originals. *Id.* at 391. The Court stated the rule prohibiting the unlawful acquisition of evidence not only requires that evidence so acquired may not be used in court, but that it may not be used at all. *Id.* at 392.

910. *Id.* The *Silverthorne* Court stated that facts obtained through illegal means do not become "sacred and inaccessible." *Id.* Therefore, evidence of these facts is admissible if also obtained from an independent source. *Id.*

911. *Brewer v. Williams*, 430 U.S. 387, 407-08 n.12 (1977). In *Brewer*, the Court ruled that the police had unlawfully elicited the location of a murder victim's body from the defendant. *Id.* at 404. The Court observed, however, that evidence of where the body was found and the condition it was in might be admissible on retrial, based on the theory that the body would have been discovered in any event. *Id.* at 407-08 n.12.

912. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963).

In *Wong Sun*, federal narcotics agents, acting on an informant's tip, broke into the home of Toy, the proprietor of a laundry. A search of the premises did not yield any narcotics. Toy denied knowledge of any drug trafficking activities; however, he accused Yee of selling narcotics. When the authorities confronted Yee, he surrendered heroin to them and identified Wong Sun as the person who sold him the drug. A search of Wong Sun's home again yielded no narcotics. *Id.* at 473-75.

All three suspects were subsequently released on their own recognizance after being

In *United States v. Lopez-Martinez*,⁹¹³ the Ninth Circuit considered whether evidence of a statement made by the defendant following an alleged illegal arrest was admissible in subsequent proceedings on an unrelated offense.⁹¹⁴ Defendant Lopez-Martinez was arrested on charges of importing and possessing a package of heroin with intent to distribute. The defendant waived his *Miranda* rights,⁹¹⁵ and informed border patrol agents that he had been offered \$1,000 to transport the package across the border. Lopez-Martinez claimed he was not aware of the contents of the package, but had suspected it might contain marijuana.⁹¹⁶ To refute this defense, the government introduced evidence of a statement the defendant had made to a Drug Enforcement Administration (DEA) agent in 1974 while under arrest for possession of marijuana with intent to distribute. Despite Lopez-Martinez's objection, the agent testified that, at the time of the 1974 arrest, the defendant told him he was paid \$1,000 for driving two vehicles containing 680 pounds of marijuana from Mexico to Arizona.⁹¹⁷

arraigned. Wong Sun, Yee and Toy were all questioned by federal narcotics agents a few days later after each had been advised of his rights. Both Toy and Wong Sun made confessions. *Id.* at 476-77.

At trial, the government submitted into evidence Toy's statements made at the time of the break-in, the heroin surrendered by Yee, and Wong Sun's and Toy's confessions. The defendants moved to suppress the evidence as fruits of the unlawful arrests and attendant searches, but the trial court denied the motion. *Id.* at 477. Both Toy and Wong Sun were convicted of knowingly transporting and concealing illegally imported heroin. The Ninth Circuit affirmed the convictions and the Supreme Court granted certiorari. *Id.* at 473.

The Court held that Toy's statements, made immediately after the federal agents invaded his home, could not be used against him because they constituted a fruit of the illegal break-in, stating Toy's decision to speak was not a sufficient intervening act of free will to purge the taint of the unlawful invasion of Toy's home. *Id.* at 484-86. The Court concluded its opinion by ruling that, although Wong Sun's arrest was without probable cause, his confession was voluntarily made several days after his release. As a result, the connection between his unlawful arrest and his confession had "become so attenuated as to dissipate the taint," thereby justifying its admission. *Id.* at 491 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

913. 725 F.2d 471 (9th Cir. 1983).

914. *Id.* at 475-76.

915. *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court stated that procedural safeguards must be employed to protect the privilege against self-incrimination. Prior to questioning, a suspect must be advised that (1) he has the right to remain silent, (2) anything he says can be used against him in a court of law, (3) he has the right to the presence of an attorney, and (4) if he cannot afford an attorney, one will be appointed prior to questioning if he so desires. *Id.* at 444.

916. 725 F.2d at 472.

917. *Id.* The Ninth Circuit observed that having previously been paid \$1,000 to transport 680 pounds of marijuana across the border in 1974, Lopez-Martinez could not possibly have believed he was being paid the same amount to smuggle a mere pound and a half of the same substance. Therefore, the jury could reasonably infer the defendant must have known he was carrying a drug worth considerably more than a pound of marijuana. *Id.* at 475.

On appeal, the defendant contended that the trial judge erred in admitting the DEA agent's testimony without a hearing to determine whether the stop that led to his 1974 arrest was illegal.⁹¹⁸ The Ninth Circuit stated that the exclusionary rule "has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons,"⁹¹⁹ and application of the rule is unwarranted when it does not result in considerable deterrence of police misconduct.⁹²⁰ Noting the absence of collusion or bad faith on the part of the arresting officers,⁹²¹ the court held that the trial judge had not erred in admitting the DEA agent's testimony because the measure of deterrence provided by exclusion of the statements made by Lopez-Martinez at his 1974 arrest did not outweigh the cost to society resulting from the loss of relevant and probative evidence in the 1982 trial.⁹²²

In *United States v. Garcia-Nunez*,⁹²³ the Ninth Circuit addressed the novel issue of whether the guilt of a co-conspirator may be attributed to another defendant in order to establish a charge of aiding and abetting when the evidence supporting the co-conspirator's conviction was obtained in violation of the defendant's constitutional rights.⁹²⁴ Police officers placed defendant Benson's home under surveillance because they suspected the house was being used in a scheme to smuggle undocumented aliens. After a short period of time, a few men left the house and drove away. An officer stopped the car and the passengers admitted they were in the United States illegally. Police officers then searched Benson's home and discovered several undocumented aliens,

918. *Id.* at 476. The government argued Lopez-Martinez had waived any claim concerning the legality of the 1974 arrest when he pled guilty in the subsequent trial. *Id.* In addition, the government argued Lopez-Martinez was collaterally estopped from challenging the legality of the arrest. *Id.* The Ninth Circuit did not consider either argument because Lopez-Martinez was challenging only the legality of the stop, an issue which was not determined in the 1974 proceeding. *Id.*

919. *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974) (use of exclusionary rule confined to situations where the government seeks to use illegally obtained evidence to incriminate victim of the unlawful search)).

920. *Id.* (citing *United States v. Janis*, 428 U.S. 433, 454 (1976) (minimal likelihood of deterrence of state police misconduct does not justify exclusion of evidence from federal civil proceedings that was illegally seized by state law enforcement officials)).

921. *Id.* The court stated that because eight years separated the two arrests, and use of the defendant's unlawfully obtained statement in the present proceedings could not possibly have been foreseen by the arresting agents in 1974, the 1982 trial against Lopez-Martinez was not within the agents' "zone of primary interest." *Id.* See *United States v. Janis*, 428 U.S. 433, 458 (1976); *Tirado v. Commissioner*, 689 F.2d 307, 311 (2d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983).

922. 725 F.2d at 476.

923. 709 F.2d 559 (9th Cir. 1983).

924. *Id.* at 562.

including Medina.⁹²⁵

Benson was charged with conspiring to conceal⁹²⁶ and transport⁹²⁷ undocumented aliens, harboring Medina,⁹²⁸ and aiding and abetting a co-conspirator in transporting Medina.⁹²⁹ The district court granted Benson's motion to suppress Medina's testimony, ruling it was a fruit of the illegal search of Benson's home and was thus inadmissible against Benson.⁹³⁰ Benson was acquitted of harboring Medina, but was convicted of conspiracy and aiding and abetting.⁹³¹

On appeal, Benson contended that sufficient evidence did not exist to support his conviction for aiding and abetting.⁹³² The prosecution, on the other hand, argued Benson was vicariously liable for the transportation of the undocumented aliens because it was an act by his co-conspirator in furtherance of the smuggling conspiracy.⁹³³

925. *Id.* at 560-61.

926. 18 U.S.C. § 371 (1976) provides in pertinent part:

If two or more persons conspire . . . to commit any offense against the United States . . . or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

927. 8 U.S.C. § 1324(a) (1976) provides in pertinent part:

Any person . . . who (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise; (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law; (3) willfully or knowingly conceals, harbors, or shields from detection, . . . in any place, including any building or any means of transportation . . . any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs.

928. Defendant Benson was charged with violating 8 U.S.C. § 1324(a)(3). *See supra* note 927.

929. 18 U.S.C. § 2(a) (1976) provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

930. 709 F.2d at 561.

931. *Id.*

932. *Id.* at 562.

933. *Id.* (citing *Pinkerton v. United States*, 328 U.S. 640, 645-47 (1945) (party to a continuing conspiracy may be responsible for substantive offenses of co-conspirator committed in furtherance of the conspiracy absent participation in, or knowledge of, the co-conspirator's acts); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979) (while part of the conspiracy, each conspirator is responsible for his co-conspirator's acts committed in furtherance thereof)). The court noted evidence supporting guilt of the principal offense may be used to convict co-conspirators charged with aiding and abetting. 709 F.2d at 562 (citing *United States v. Bryan*, 483 F.2d 88, 95-97 (3d Cir. 1973) (evidence demonstrating defendant was

The appellate court noted that the co-conspirator's conviction was supported solely by evidence gathered in violation of Benson's fourth amendment rights.⁹³⁴ In reversing Benson's conviction on the aiding and abetting charge,⁹³⁵ the Ninth Circuit held the connection between the illegal search of Benson's home and the use of the co-conspirator's conviction was not so attenuated as to remove the taint of the unlawful search.⁹³⁶ The court reasoned that use of the illegally obtained evidence against Benson was not only foreseeable, but intentional as well.⁹³⁷ Moreover, the court reasoned that attributing the guilt of the co-conspirator, who lacked standing to object to the use of the illegally obtained evidence, to Benson would eliminate the deterrence function

the principal, not the aider and abettor in the crime charged, does not constitute an amendment of the indictment for aiding and abetting); *United States v. Bell*, 457 F.2d 1231, 1235 (5th Cir. 1972) (jury had authority to find defendant guilty as a principal even though he was only indicted on charges of aiding and abetting)).

934. 709 F.2d at 562. U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

935. 709 F.2d at 562.

936. *Id.* (citing *United States v. Ceccolini*, 435 U.S. 268 (1978); *United States v. Duncan*, 570 F.2d 292 (9th Cir. 1979)).

In *Ceccolini*, a police officer was in the defendant's flower shop conversing with one of the employees when he noticed an envelope with money protruding from it lying on the cash register. Upon closer examination, the officer discovered the envelope also contained betting slips. The employee informed the officer that the envelope belonged to the defendant. The police officer reported his findings to local detectives and the FBI. Four months later, FBI agents questioned the employee without referring to the earlier incident in the flower shop. After another six months, the defendant was summoned before a federal grand jury where he testified he had never taken bets at the shop. The employee, however, testified to the contrary, and the defendant was subsequently found guilty of perjury. *United States v. Ceccolini*, 435 U.S. 268, 269-72 (1978).

The district court then granted the defendant's motion to suppress the employee's testimony because "she 'first came directly to the attention of the government as a result of an illegal search' " and the government had not sustained its burden of proving the employee's testimony would have been obtained from a source independent of the illegal search. Suppression of the employee's testimony was affirmed by the Second Circuit. *Id.* at 272-73.

The Supreme Court reversed, holding the degree of attenuation between the illegal search and the flower shop employee's testimony at trial was sufficient to dissipate the taint of the illegal search. *Id.* at 279-80. The Court noted that the employee's testimony was clearly an act of her own free will which was in no way coerced or induced by police officials. *Id.* at 279. In addition, a substantial amount of time had passed between the illegal search and both the initial contact with the witness by police officials and the witness' testimony at trial. *Id.* The Court concluded its opinion by observing that there was no evidence that the police had made the unlawful search with the intent of finding physical evidence bearing on an illegal gambling operation or a witness willing to testify against the defendant. Thus, application of the exclusionary rule would not serve as a deterrent. *Id.* at 279-80.

937. 709 F.2d at 562.

of the exclusionary rule in future conspiracy cases.⁹³⁸

When a confession is the fruit of an illegal search or seizure, the giving of *Miranda* warnings, while significant, is not sufficient to establish that the confession was an exercise of free will, thereby breaking the causal connection between the illegality and the confession.⁹³⁹ The court must also consider the purpose and flagrancy of the police misconduct, the length of time between the unlawful police conduct and the confession, and the presence of intervening circumstances.⁹⁴⁰

In *United States v. Manuel*,⁹⁴¹ the Ninth Circuit considered whether the defendant's confession, made the day after he was arrested, was tainted because the police had prematurely ordered his arrest.⁹⁴² While investigating a stabbing incident, a Federal Bureau of Investigation agent learned that defendant Manuel had admitted his part in the murder of an individual whose body had been found on the Salt River Indian Reservation earlier that same day. The FBI shared this information with the tribal police who went to the defendant's home the next day to question him. The sequence of events that followed was disputed at trial.⁹⁴³

The government contended the FBI and the tribal police interviewed members of the defendant's family who claimed to have been eyewitnesses to the killing, and found evidence at the scene which corroborated the witnesses' stories. They subsequently located Manuel and placed him under arrest. The defendant, on the other hand, claimed his arrest was ordered as soon as the FBI and the tribal police

938. *Id.*

939. *Brown v. Illinois*, 422 U.S. 590, 603 (1975).

In *Brown*, two detectives broke into defendant Brown's apartment, searched it, and then arrested Brown without a warrant and without probable cause. The officers took him to the police station where the defendant subsequently made an inculpatory statement concerning a murder after having been read his *Miranda* rights. The defendant repeated his confession when interrogated five hours later. The trial court denied Brown's motion to suppress the statements, and his trial resulted in a murder conviction. *Id.* at 592-96.

The Supreme Court held the receipt of *Miranda* warnings, per se, did not make the defendant's inculpatory statements admissible. *Id.* at 603. The Court noted that Brown's arrest was investigatory and the manner in which it was executed indicated it was "calculated to cause surprise, fright, and confusion." *Id.* at 605. The Court further observed that less than two hours had passed between Brown's illegal arrest and his first confession, and no intervening event of any significance had occurred to break the causal chain between the two events. Thus, evidence of Brown's first confession was inadmissible. *Id.* at 604-05. The Court further held the second confession was a fruit of the first confession and, therefore, it too was inadmissible. *Id.* at 605.

940. *Id.* at 603-04.

941. 706 F.2d 908 (9th Cir. 1983).

942. *Id.* at 911.

943. *Id.* at 909-10.

arrived at his home.⁹⁴⁴ The morning following his arrest,⁹⁴⁵ Manuel readily confessed his role in the killing, after carefully being instructed with regard to his *Miranda* rights.⁹⁴⁶

On appeal, Manuel claimed his arrest was illegal because it had been ordered before the tribal police had probable cause to arrest him.⁹⁴⁷ Manuel further contended his confession should have been suppressed because it was the fruit of his illegal arrest.⁹⁴⁸ The Ninth Circuit, however, concluded that it need not determine the legality of the arrest because intervening events had sufficiently attenuated the confession from any initial taint of illegality.⁹⁴⁹ The Ninth Circuit reasoned that, although the order for Manuel's arrest may have been premature, probable cause was amply established by the time Manuel was actually arrested.⁹⁵⁰ Furthermore, the court decided that additional factors weighed in favor of a finding of attenuation: (1) the trial court expressly found Manuel's statements to be voluntary; (2) a considerable period of time had elapsed between Manuel's arrest and his interrogation; and (3) tribal police conduct, if illegal, was neither flagrant nor designed to pressure Manuel into confessing.⁹⁵¹

In *United States v. Lee*,⁹⁵² the Ninth Circuit considered whether the trial court had correctly suppressed the defendant's second murder confession, as well as evidence uncovered by law enforcement officials as a result of the defendant's two confessions.⁹⁵³ Federal agents went to Lee's home to investigate the murder of Lee's wife. The defendant

944. *Id.* at 910.

945. *Id.* At the time of their arrest, all three suspects were heavily intoxicated. The FBI and the tribal police resolved not to question them while they were under the influence of alcohol and allowed the suspects to sleep until the following morning. *Id.*

946. *Id.* Manuel was subsequently convicted of second-degree murder.

947. *Id.* at 911. The Ninth Circuit stated that the district court had not made factual findings essential to determining whether sufficient cause to arrest Manuel existed at the time the arrest was ordered. *Id.*

948. *Id.*

949. *Id.* The *Manual* court noted that the United States Supreme Court stresses the presence or absence of intervening discovery as an essential element in determining whether a confession is sufficiently attenuated from an illegal arrest to be admissible. *Id.* at 912 (citing *Dunaway v. New York*, 422 U.S. 200, 218 (1979); *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)). See *supra* notes 939-40 and accompanying text.

950. 706 F.2d at 912. The court distinguished the case at hand from *Brown v. Illinois*, 422 U.S. 590 (1975) and *Dunaway v. New York*, 442 U.S. 200 (1979), because probable cause was firmly established before Manuel was interrogated, a factor not present in *Brown* or *Dunaway*. In *Brown* and *Dunaway* the defendants were arrested without probable cause and immediately questioned by the authorities. 706 F.2d at 911-12.

951. *Id.* at 912. See *Dunaway*, 442 U.S. at 218; *Brown*, 422 U.S. at 603-04.

952. 699 F.2d 466 (9th Cir. 1982) (per curiam).

953. *Id.* at 468.

informed them that his wife had been killed while he was away from home. Without advising Lee of his *Miranda* rights, the agents questioned Lee in an FBI vehicle parked in front of the Lee home. The defendant confessed to the homicide, signed a waiver of rights form, and, shortly thereafter, allowed the agents to search his tool shed. The officers located the murder weapon, a lead pipe, but declined to arrest the defendant.⁹⁵⁴

The next day, Lee voluntarily appeared at the Bureau of Indian Affairs office and again signed a standard waiver form. After agents read the defendant his *Miranda* rights in both Navajo and English, Lee repeated his confession and surrendered the pair of shoes he was wearing at the time of his wife's murder.⁹⁵⁵ At Lee's trial for first degree murder,⁹⁵⁶ the district judge granted the defendant's motion to suppress both confessions, the murder weapon, and the shoes.⁹⁵⁷

After deciding Lee's initial confession had been unlawfully obtained,⁹⁵⁸ the Ninth Circuit ruled that the trial court had correctly suppressed the lead pipe because its discovery was a direct result of the unlawful confession.⁹⁵⁹ The Ninth Circuit further held that Lee's second confession was not sufficiently attenuated from the illegal interrogation on the day of the murder and, therefore, was correctly suppressed by the trial judge.⁹⁶⁰ The court reasoned that the defendant's second confession was not an act of free will sufficient to purge the taint⁹⁶¹ because it was obtained less than twenty-four hours after the first confession had been elicited, without a *Miranda* warning and

954. *Id.* at 467.

955. *Id.* at 467-68.

956. The defendant was charged with violating 18 U.S.C. § 1111 (1976) and 18 U.S.C. § 1153 (1976). 18 U.S.C. § 1111(a) (1976) provides in pertinent part that "[m]urder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing . . . is murder in the first degree." 18 U.S.C. § 1153 (1976) provides in relevant part that "[a]ny Indian who commits against . . . another Indian or other person any . . . murder . . . within the Indian country, shall be subject to the same laws and penalties as all other persons committing [that same offense], within the exclusive jurisdiction of the United States."

957. 699 F.2d at 467.

958. *Id.* at 468. The court determined that a reasonable person could have concluded he was in custody during the time Lee was questioned by the agents in the FBI vehicle. Therefore, Lee should have been instructed with regard to his *Miranda* rights before his confession was elicited. *Id.*

959. *Id.* The government had previously conceded that, if the defendant's confession was illegally obtained, the lead pipe should be suppressed as a fruit of the poisonous tree. *Id.* (citing *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963)). See *supra* note 912.

960. 699 F.2d at 468-69 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)).

961. *Id.* (citing *Brown v. Illinois*, 422 U.S. 590 (1975)). See *supra* note 939.

because the confessions were identical.⁹⁶²

Finally, the Ninth Circuit reversed the trial court's suppression of the defendant's shoes.⁹⁶³ The court stated there was an insufficient connection between Lee's initial confession and the shoes to justify their suppression as a fruit of the poisonous tree.⁹⁶⁴ The court reasoned that since federal agents had discovered footprints at the murder scene before they interviewed Lee, a subsequent investigation would have inevitably led to the discovery of the shoes that made the footprints.⁹⁶⁵

II. PROCEDURAL RIGHTS OF THE ACCUSED

A. *The Right Against Self-Incrimination*

1. Scope of the privilege

In *South Dakota v. Neville*,⁹⁶⁶ the United States Supreme Court held that admission into evidence of the defendant's refusal to submit to a blood-alcohol test did not violate his fifth amendment right against self-incrimination.⁹⁶⁷ The defendant refused to submit to a blood-alcohol test after being warned by the arresting officer that he could lose his drivers license for so refusing.⁹⁶⁸ The Court had previously ruled that the fifth amendment privilege applies only to compelled "communications or testimonial" evidence; because it characterized a blood test as "physical or real" evidence, the Court held that the privilege did not apply.⁹⁶⁹ In *Neville*, rather than categorize a refusal to submit to a blood-alcohol test as either "physical" or "testimonial" evidence,⁹⁷⁰ the

962. 699 F.2d at 468.

963. *Id.* at 469.

964. *Id.* (citing *United States v. Allard*, 634 F.2d 1182, 1183 (9th Cir. 1980) (ongoing illegal seizure of defendant's hotel room while awaiting issuance of search warrant sufficient to justify suppression even though warrant not procured based on information discovered pursuant to the illegal entry)).

965. *Id.*

966. 459 U.S. 553 (1983).

967. *Id.* at 554, 564.

968. *Id.* at 555-56. After failing field sobriety tests, the defendant was arrested and read his *Miranda* rights. The defendant waived his rights to silence and to counsel. The officer then asked the defendant to submit to a blood-alcohol test and warned him that he could lose his drivers license if he refused. The defendant was asked to take the test three different times and refused each time, stating that he was too drunk to pass it. The defendant was not warned any of these times that his refusal could be used against him in court.

969. *Schmerber v. California*, 384 U.S. 757 (1966).

970. The Court noted that many courts have made such a distinction and have categorized a refusal to take a blood test as "physical" evidence and, therefore, outside the protection of the fifth amendment privilege. These courts reason that a refusal to take a potentially incriminating test is a physical act and is like other circumstantial evidence. This view was expressed in *People v. Sudduth*, 65 Cal. 2d 543, 546, 421 P.2d 401, 403, 55 Cal. Rptr. 393,

Court preferred to focus on the element of compulsion involved in a suspect's refusal to take a blood test. Because the defendant was given a choice of submitting to the test or refusing it, the Court found that he was not coerced into refusing to take the test.⁹⁷¹ Consequently, the defendant was not protected by the fifth amendment right against self-incrimination and his refusal could be admitted into evidence.⁹⁷² Relying on *Doyle v. Ohio*,⁹⁷³ the defendant further contended that his due process rights were violated because he was not warned that his refusal to take the blood test could be used against him.⁹⁷⁴ The Court distinguished *Doyle*⁹⁷⁵ on the fact that *Miranda* warnings carry implicit assurance that an arrestee's silence will not be used against him or her; here, no assurances are implied in the warning that a refusal could be used at trial. The Court pointed out that the defendant was warned that he could lose his driving privileges for refusing to take the test and that it would be "unrealistic" to believe that no other consequences would follow a refusal.⁹⁷⁶ The Court concluded that the failure to warn of the further consequences of a refusal was not an implicit promise which "tricked" the defendant and, therefore, it was not fundamentally unfair to offer this evidence against the defendant at trial.⁹⁷⁷

395 (1966) (Traynor, C.J.) ("no constitutional right to refuse a test designed to produce physical evidence in the form of a breath sample"), *cert. denied*, 389 U.S. 850 (1967). A majority of jurisdictions concur with this view. *See Newhouse v. Misterly*, 415 F.2d 514, 518 (9th Cir. 1969) (refusal to take blood test not testimonial), *cert. denied*, 397 U.S. 966 (1970); *People v. Ellis*, 65 Cal. 2d 529, 533, 537, 421 P.2d 393, 395, 397, 55 Cal. Rptr. 385, 387, 389 (1966) (Traynor, C.J.) (result of voice identification test is real or physical evidence, and refusal is circumstantial evidence of consciousness of guilt).

A minority of courts view a suspect's refusal to take a potentially incriminating test as a "communicative act involving [the suspect's] testimonial capacities." *South Dakota v. Neville*, 459 U.S. 553, 557 (1983) (citing *State v. Neville*, 312 N.W.2d 723, 726 (1981)). These courts find such a refusal to be within the protection of the fifth amendment privilege against self-incrimination, and thus, not admissible into evidence.

971. 459 U.S. at 562-63. The Court noted that the fact that a suspect was given a choice does not mean that there was no coercion involved. It stated that if the "proffered alternative was to submit to a test so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession,' " then such a choice is not a "true choice." *Id.* at 563-64 (citing *Schmerber v. California*, 384 U.S. 757, 765 n.9 (1966)).

972. *Id.* at 564.

973. 426 U.S. 610 (1976).

974. 459 U.S. at 564. *See supra* note 968 and accompanying text.

975. In *Doyle*, the defendant's silence after receiving *Miranda* warnings was used at his trial for impeachment purposes. The Court held that the use of the defendant's silence was fundamentally unfair because of the implicit assurances contained in the *Miranda* warnings that his silence would not be used against him. 426 U.S. at 617-19.

976. 459 U.S. at 565-66. The Court noted that the state now fully warns suspects of the consequences of refusal, including the possibility that refusal to take the blood-alcohol test may be used against them in court. *Id.* at 566 n.17.

977. *Id.* at 566.

The Ninth Circuit rejected the defendant's contention in *United States v. Greene*⁹⁷⁸ that his fifth amendment and fourteenth amendment rights were violated when the government cross-examined him concerning his pretrial silence. The defendant had refused to answer questions or provide records to Internal Revenue Service agents investigating his income tax returns. He provided some information during pretrial discovery proceedings. At trial, the defendant offered the defense that the alleged unreported income was attributable to money repatriated from foreign bank accounts. The defendant had not disclosed the existence of these personal bank accounts before trial.⁹⁷⁹ The defendant argued that the cross-examination about his failure to raise this defense was a violation of his fifth amendment privilege against self-incrimination. In response, the Ninth Circuit stated that, even if the questions were comments on his pretrial silence, there was no fifth amendment violation because a defendant's credibility may be impeached with his own silence when he chooses to testify in his own defense.⁹⁸⁰

The defendant then contended that he was denied due process because he was induced to remain silent because of "governmental action"—the instigation of the criminal investigation by the Internal Revenue Service. The court determined that there was no fundamental unfairness here because there was no governmental action which gave "affirmative assurance" that the defendant's silence would not be used against him.⁹⁸¹ The defendant was neither arrested and taken into custody nor given *Miranda* warnings.⁹⁸² The court concluded that the

978. 698 F.2d 1364 (9th Cir. 1983).

979. *Id.* at 1367, 1373.

980. *Id.* at 1373 (citing *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) ("[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility."); *Raffel v. United States*, 271 U.S. 494, 497 (1926) (defendant who takes stand on retrial may be properly cross-examined about his prior silence)). See also *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (statement taken in violation of defendant's *Miranda* rights may be used to impeach defendant's testimony).

981. 698 F.2d at 1374 (citing *Anderson v. Charles*, 447 U.S. 404, 407-08 (1980) (per curiam) (while *Miranda* warnings implicitly assure an individual that silence will not be used against him or her, one who "voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent"); *Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982) (per curiam) (arrest, by itself, is not governmental action which implicitly induces defendant to remain silent; cross-examination about post-arrest silence when defendant takes stand is not violation of due process); *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (use of defendant's silence following arrest and *Miranda* warnings for impeachment purposes is violation of due process)). See also *supra* note 975 and accompanying text.

982. 698 F.2d at 1374. The court stated that the record was not clear as to whether the defendant received *Miranda* warnings, but noted that he did not contend that he did. *Id.*

"mere institution of a criminal investigation" by the Internal Revenue Service did not give implicit assurances that the defendant's silence would not be used against him.⁹⁸³

The defendant in *United States v. Coleman*⁹⁸⁴ contended that the registration requirements of the National Firearms Act⁹⁸⁵ violated his fifth amendment right against self-incrimination. The defendant was convicted of conspiring to commit mail fraud, and of making and transferring a destructive device in violation of the registration requirements of the National Firearms Act.⁹⁸⁶ The Act provides that information regarding an offense occurring prior to or concurrent with the time of registration which is disclosed in compliance with the registration provision cannot be used either directly or indirectly as evidence against an accused in a criminal proceeding.⁹⁸⁷ In an unusual analysis, the defendant argued that the registration requirements were unconstitutional because they forced him to incriminate himself for future criminal acts. The defendant's co-conspirators had committed acts of mail fraud following his making and transferring of the firebombs. Therefore, the defendant contended that, although registering the bombs would not have subjected the defendant to liability for his acts prior to and concurrent with the registration, evidence of the making and transfer of the bombs, as given through registration, could be used to prosecute him for subsequent criminal acts as a co-conspirator.⁹⁸⁸

The court noted that this interpretation of the fifth amendment privilege "would mean that any deceptive practices committed as part of a larger criminal scheme would be subject to the self-incrimination clause."⁹⁸⁹ The Ninth Circuit rejected such an argument because it found it to be outside the scope of the protection afforded by the fifth amendment right against self-incrimination.⁹⁹⁰ The court also pointed

983. *Id.*

984. 707 F.2d 374 (9th Cir.), *cert. denied*, 104 S. Ct. 171 (1983).

985. 26 U.S.C. §§ 5801-5872 (1976).

986. The defendant conspired with a woman to insure the life of her husband, murder him, and then collect the proceeds from the insurance policies. To that end, the defendant made Molotov cocktail firebombs to be used to kill the husband. Two co-conspirators attacked the husband with the firebombs and also attempted to shoot him, but were unsuccessful. 707 F.2d at 376.

987. 26 U.S.C. § 5848(a) (1976). The statute was upheld by the Supreme Court in *United States v. Freed*, 401 U.S. 601, 606 (1971).

988. 707 F.2d at 377.

989. *Id.* at 378.

990. *Id.* at 377 (citing *United States v. Freed*, 401 U.S. 601, 606-07 (1971) (periphery of protection offered by privilege against self-incrimination does not "suppl[y] insulation for a career of crime about to be launched")). The Ninth Circuit succinctly stated that the "fifth amendment is not a partner in prospective criminal acts." *Id.*

out that the defendant's concern that the registration information could be used as evidence against him on the conspiracy charge was ill-founded because the government would be precluded from using such information if the conspiracy was formed prior to registering the bombs.⁹⁹¹

The Ninth Circuit in *Jones v. Cardwell*⁹⁹² ruled that the right against self-incrimination applied to statements made by the defendant in a presentence interview conducted by a probation officer.⁹⁹³ During this interview the defendant admitted other criminal activity which was used by the judge in determining his sentence.⁹⁹⁴ The court relied on *Estelle v. Smith*⁹⁹⁵ for its ruling, finding that the rationale there supported application of the fifth amendment privilege to the interview here.⁹⁹⁶ Because of the serious consequences to the defendant of having his statements used to enhance his sentence, the Ninth Circuit determined that the defendant was protected by the privilege.⁹⁹⁷

In *McCoy v. Commissioner*,⁹⁹⁸ the plaintiffs petitioned the Tax Court for redetermination of a tax deficiency. The plaintiffs claimed the fifth amendment privilege in refusing to comply with both discovery requests and a court order for production of documents. The Tax

991. *Id.* See *supra* notes 987-88 and accompanying text.

992. 686 F.2d 754 (9th Cir. 1982).

993. *Id.* at 755. The defendant, convicted of first-degree burglary and rape, was in custody awaiting sentencing when he was questioned by the probation officer.

994. *Id.* The court noted that, while a sentencing judge's discretion is broad in imposing a sentence, the judge may not consider information obtained in violation of a defendant's constitutional rights in determining the sentence. *Id.* at 756. *Cf.* *United States v. Tucker*, 404 U.S. 443, 447-49 (1972) (remand affirmed where, in determining defendant's sentence, judge relied on two prior felony convictions obtained in violation of defendant's sixth amendment right to counsel); *Verdugo v. United States*, 402 F.2d 599, 609-13 (9th Cir. 1968) (remand appropriate where, in determining defendant's sentence, judge considered evidence obtained in violation of defendant's fourth amendment right against illegal searches and seizures), *cert. denied*, 402 U.S. 961 (1971).

995. 451 U.S. 454 (1981) (fifth amendment privilege applicable to penalty stage of capital proceeding where statements were obtained during pretrial psychiatric examination without warning of consequences).

996. 686 F.2d at 756. The *Estelle* Court stated that the essence of the privilege is that the state must produce independent evidence to "convict and punish" an individual rather than rely on compelled confessions of an accused. 451 U.S. at 462 (citing *Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961)). Furthermore, the protection of the fifth amendment privilege against self-incrimination "does not turn upon the type of proceeding . . . but upon the nature of the statement or admission and the exposure which it invites." 451 U.S. at 462 (quoting *In re Gault*, 387 U.S. 1, 49 (1967)).

In *Estelle*, the Court determined that the defendant's exposure to the possibility of the death sentence was of the gravest consequence and that, therefore, "the State is not relieved of the obligation to observe fundamental constitutional guarantees." 451 U.S. at 463. "

997. 686 F.2d at 756.

998. 696 F.2d 1234 (9th Cir. 1983).

Court subsequently dismissed the case for failure to prosecute.⁹⁹⁹ The Ninth Circuit stated that the fifth amendment privilege may only be invoked against real and substantial hazards against self-incrimination.¹⁰⁰⁰ According to the court, any such hazard in this case appeared speculative. The court thus held that the plaintiffs must explain their fear of criminal prosecution to justify invocation of the privilege.¹⁰⁰¹ Because the plaintiffs did not make a "positive disclosure" of any hazards inherent in complying with discovery, the court upheld dismissal of the case.¹⁰⁰²

2. Requirement of *Miranda* warnings

The ruling of *Miranda v. Arizona*¹⁰⁰³ requires that any person who is in custody must be warned of his or her constitutional rights before being interrogated by law enforcement officers.¹⁰⁰⁴ The suspect must be advised of his or her right to remain silent, that anything the suspect says may be used against him or her in court, that he or she has the right to counsel before and during questioning, and that counsel will be appointed if the suspect cannot afford one.¹⁰⁰⁵

The Ninth Circuit in *Baumann v. United States*¹⁰⁰⁶ held that *Miranda* warnings are not required prior to a routine presentence interview with a probation officer for a defendant convicted of a non-capital crime.¹⁰⁰⁷ The court construed *Estelle v. Smith*¹⁰⁰⁸ narrowly to apply to the facts of that case.¹⁰⁰⁹ The court distinguished *Estelle* from the pres-

999. TAX COURT RULES 123(a) & (b) provide that noncompliance with any court order, including one directing production of documents, may result in dismissal of the case.

1000. 696 F.2d at 1236 (citing *United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980)).

1001. *Id.* at 1236.

1002. *Id.* The court found the plaintiff's appeal from dismissal by the Tax Court to be frivolous and awarded double costs to the appellee. *Id.* at 1237.

1003. 384 U.S. 436 (1966).

1004. *Id.* at 444, 467, 478-79.

1005. *Id.* at 467-74.

1006. 692 F.2d 565 (9th Cir. 1982).

1007. *Id.* at 576.

1008. 451 U.S. 454 (1981). In *Estelle*, the defendant underwent a competency examination prior to his trial for murder. At a separate sentencing proceeding after his conviction by a jury, the psychiatrist who had examined him prior to trial was allowed to testify as to the defendant's dangerousness, a factor used to enhance the defendant's sentence. The United States Supreme Court held that, because the question of dangerousness was critical to the defendant, he should have been given the *Miranda* warnings so that he could decide whether to invoke his rights to remain silent or consult with an attorney. *Id.* at 466-69.

1009. The Court in *Estelle* stated: "[W]e do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination." *Id.* at 469 n.13.

ent case in two ways. First, *Estelle* was a capital case entailing a bifurcated proceeding in which the defendant could have been sentenced to death. Here, the defendant was convicted of mail fraud, a non-capital crime with no such grave consequences. Second, *Estelle* involved the issue of the defendant's future dangerousness, a critical factor because it could be used to enhance his sentence if proved by the state beyond a reasonable doubt. In *Baumann*, however, the issue of the defendant's remorsefulness was merely information which the judge could use in the exercise of his substantial discretion in imposing sentence.¹⁰¹⁰

The court also pointed out that the purpose of the warnings outlined in *Miranda* is to protect a suspect who is confronted by the inherently coercive pressures of a custodial interrogation.¹⁰¹¹ The court found that no such compelling atmosphere prevailed at the defendant's routine presentence interview. Therefore, no warnings were required to be given the defendant.¹⁰¹²

3. Custody

A suspect who is in the custody of law enforcement officers must be warned of his or her constitutional rights before he or she may be interrogated, as necessitated under the ruling of *Miranda v. Arizona*.¹⁰¹³ The Ninth Circuit has looked recently at the circumstances which would constitute a custodial interrogation and thereby require *Miranda* warnings prior to any questioning.

In *United States v. Allen*,¹⁰¹⁴ the Ninth Circuit affirmed the district court's conclusion that the defendant was not in custody when questioned by agents at his place of business.¹⁰¹⁵ The agents had no knowledge that the defendant was a convicted felon, but were merely seeking information for an investigation of a firearms dealer from whom the defendant had ordered parts. The court based its determination of whether the defendant was in custody on the "totality of facts" present at the time of questioning.¹⁰¹⁶ The court found no evidence that the

1010. 692 F.2d at 576.

1011. *Id.* at 576-77; *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

1012. 692 F.2d at 576.

1013. 384 U.S. 436, 478-79 (1966) ("[W]hen an individual is taken into custody . . . [h]e must be warned prior to any questioning . . .").

1014. 699 F.2d 453 (9th Cir. 1982).

1015. *Id.* at 459.

1016. *Id.* at 458. The court stated:

Pertinent areas of inquiry include the language used by the officer to summon the individual, the extent to which he or she is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention and the degree of pressure applied to detain the individual. Based upon a review of all the

agents exerted any pressure on the defendant to answer their questions or that the defendant was threatened or physically restrained in any way. The court decided that a reasonable, innocent person being questioned in the defendant's circumstances would feel that he or she would be free to leave.¹⁰¹⁷ Therefore, the court concluded that the defendant was not in custody for purposes of *Miranda* at the time the agents questioned him.¹⁰¹⁸

The Ninth Circuit reiterated its prior holdings in *United States v. Wilson*¹⁰¹⁹ that a request for identification in the course of a routine investigatory stop does not constitute custody so as to warrant recitation of the *Miranda* warnings.¹⁰²⁰ In *Wilson*, officers were looking for the defendant after he failed to return to a federal half-way house. After observing the defendant leave his girlfriend's house, the officers approached him on the street and identified themselves. In answer to their request, the defendant produced two forms of identification. The court concluded that the "mere request for written identification" of a suspect does not require *Miranda* warnings.¹⁰²¹ Here, the request for the defendant's identification occurred on the street as part of a routine investigation by the officers. The defendant was not coerced in any way before giving the officers his identification. As long as such requests for identification are part of a routine investigation, and any questioning does not take place in a police-dominated or compelling setting, the request does not constitute a custodial interrogation.¹⁰²²

However, the officers in *Wilson* then told the defendant that they would have to detain him unless he could better identify himself.¹⁰²³

pertinent facts, the court must determine whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave.

Id. at 458-59 (quoting *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981)).

1017. *Id.* at 459.

1018. *Id.*

1019. 690 F.2d 1267 (9th Cir. 1982).

1020. *Id.* at 1274.

1021. *Id.*

1022. *Id.* In *United States v. Hickman*, 523 F.2d 323, 326-27 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976), the defendants were suspected of bringing contraband into the country aboard a boat. Customs agents stopped the defendants by driving their car in front of the defendant's truck which was towing the boat. The agents asked defendant Hickman for identification and for the name of the owner of the truck, trailer and boat. The Ninth Circuit found that, because no weapons or threats were used by the agents to stop the defendant's truck, and the questioning was not done in a compelling setting dominated by police officers, the stopping and questioning of the defendants was an investigatory stop which did not trigger the requirement of giving *Miranda* warnings. *Id.*

1023. Defendant Wilson had given the officers two pieces of false identification. 690 F.2d at 1270.

The court concluded that at this point the defendant's freedom was significantly impaired so that the officers' questioning constituted a custodial interrogation under the criteria outlined in *Miranda*.¹⁰²⁴ Therefore, the statements made by the defendant after this point were obtained in violation of the defendant's fifth amendment rights because no *Miranda* warnings were given.¹⁰²⁵

The Ninth Circuit in *United States v. Lee*¹⁰²⁶ concluded that the defendant was in custody while he was being questioned in a Federal Bureau of Investigation (FBI) car parked in front of his house. Although the defendant had been told upon entering the car that he was free to leave at any time, the court held that, considering the totality of the circumstances, the defendant was reasonable in believing he was not free to leave the site of the questioning.¹⁰²⁷ While the defendant was being questioned, police were investigating in and around his house. After more than an hour of interrogation in the closed car, the defendant confessed to choking his wife.¹⁰²⁸ Because the defendant was never advised of his constitutional rights before the interrogation, the court affirmed the suppression of the confession obtained during questioning.¹⁰²⁹

4. Waiver of *Miranda* rights

An individual may waive his or her fifth amendment right against self-incrimination and the right to counsel. Such a waiver can occur only following a reading of the warnings required by *Miranda v. Arizona*¹⁰³⁰ so that the individual may knowingly and intelligently decide whether to exercise his or her rights or waive them. Whether a valid

1024. *Id.* at 1274. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

1025. 690 F.2d at 1274. However, the court held that, while the defendant's statements were admitted into evidence in error, a reversal was not justified. The court pointed out that there was "substantial, independent, and credible evidence of defendant's guilt," so that the error of admitting the statements was harmless beyond a reasonable doubt. *Id.* at 1275.

1026. 699 F.2d 466, 468 (9th Cir. 1982).

1027. *Id.* See *United States v. Bekowies*, 432 F.2d 8, 13 (9th Cir. 1970) ("[I]t is nevertheless true that close and persistent questioning, accompanied by . . . an evident belief by the interrogating officers that the suspect is lying, may reasonably induce in a suspect the belief that he is no longer free to go about his business without significant restraint.").

1028. 699 F.2d at 467. See *United States v. Scharf*, 608 F.2d 323, 325 (9th Cir. 1979) (defendant in custody while being questioned in police car in front of his house while other officers remained on the scene).

1029. 699 F.2d at 468.

1030. 384 U.S. 436, 475-79 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 490 n.14 (1964); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

waiver has been made is determined by looking at the totality of the circumstances.¹⁰³¹

In *Oregon v. Bradshaw*,¹⁰³² the United States Supreme Court considered whether the defendant waived his fifth amendment rights after he had requested the assistance of counsel during a police interrogation. The defendant in *Bradshaw* had been given his *Miranda* warnings and had responded to police questioning. After the defendant requested counsel, the interrogation was terminated. While being transferred from the police station to jail, the defendant initiated communication with the police officer who accompanied him.¹⁰³³ The officer responded that the defendant did not have to talk to him since he knew the defendant had requested an attorney. The defendant answered that he understood his rights. As a result of the discussion with the officer, the defendant underwent a polygraph test the following day after signing a written waiver form. The defendant confessed to the crime when the test was over.

The lower court determined that the defendant's inquiry itself amounted to a waiver. In a plurality opinion delivered by Justice Rehnquist,¹⁰³⁴ four members of the Supreme Court emphasized that determination of whether the defendant has made a valid waiver of his previously invoked fifth amendment rights is a two-step process. First, the court must inquire whether the suspect, in fact, initiated the dialogue with authorities as required by the rule in *Edwards v. Arizona*.¹⁰³⁵ Second, if the court finds such an initiation of communication,¹⁰³⁶ it must ask whether a valid waiver of the suspect's fifth amendment rights

1031. The determination whether a purported waiver was knowing and intelligent depends "upon the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). See *North Carolina v. Butler*, 441 U.S. 369, 372-75 (1979) (express waiver not required, but waiver may be inferred from "actions and words" of the accused).

1032. 103 S. Ct. 2830 (1983) (plurality opinion).

1033. *Id.* at 2833. While the Court found the defendant's inquiry "ambiguous," it stated that "[t]here can be no doubt in this case that in asking, 'well, what is going to happen to me now?', [defendant] 'initiated' further conversation in the ordinary dictionary sense of that word." *Id.* at 2835.

1034. Justice Rehnquist announced the judgment and delivered the opinion, joined by the Chief Justice, Justice White, and Justice O'Connor.

1035. 451 U.S. 477, 484-85 (1981) ("We . . . hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.").

1036. The Court defined such an initiation of conversation as a question by the suspect "evin[cing] a willingness and a desire for a generalized discussion about the investigation [and] not merely a necessary inquiry arising out of the incidents of the custodial relationship." 103 S. Ct. at 2835.

had occurred.¹⁰³⁷ Applying this two-part test, the Court concluded that the defendant in *Bradshaw* had initiated the dialogue with the police officer¹⁰³⁸ and, further, that the defendant had validly waived his rights to silence and to the assistance of counsel.¹⁰³⁹

In his concurring opinion, Justice Powell agreed that the defendant made a valid waiver of his constitutional rights.¹⁰⁴⁰ Justice Powell argued, however, that the two-part test is not required when a defendant has invoked his fifth amendment rights during interrogation. He would prefer to make this determination by looking only at the totality of circumstances present in each case.¹⁰⁴¹

Justice Marshall,¹⁰⁴² writing for the dissent, agreed with the plurality that a two-step inquiry is necessary to determine whether a valid waiver has been made by a defendant after he has previously invoked his fifth amendment rights.¹⁰⁴³ However, the dissent reasoned that the defendant's query to the officer in this case was not an initiation which would invite further interrogation and, thus, fall within the scope of *Edwards*.¹⁰⁴⁴ Because there was no initiation of communication by the defendant here, the dissent found it unnecessary to discuss the waiver issue.¹⁰⁴⁵

1037. The Court phrased the second part of the test as follows: "[W]hether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Id.* at 2835 (quoting *Edwards*, 451 U.S. at 486 n.9).

1038. *See supra* note 1035.

1039. 103 S. Ct. at 2835. The Court did not dispute the trial court's finding that the defendant's statements were voluntary and a result of a knowing and intelligent waiver because it was based on the court's "first-hand observation of the witnesses to the events involved." *Id.*

1040. *Id.* at 2838 (Powell, J., concurring).

1041. *Id.* at 2837-38 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see supra* note 1030 and accompanying text). Justice Powell's concern was that the Court had not offered any clarification and guidelines to lower courts which are faced with this issue. The Court has, instead, outlined a two-part test which Powell asserts will only result in confusion for the lower courts. 103 S. Ct. at 2837 n.3.

1042. Justice Marshall was joined in the dissent by Justice Brennan, Justice Blackmun, and Justice Stevens.

1043. 103 S. Ct. at 2840 & n.2 (Marshall, J., dissenting): "If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the existence of a knowing and intelligent waiver . . ."

1044. *Id.* at 2840 (Marshall, J., dissenting). Justice Marshall stated that the initiation of further communication with the authorities as described in *Edwards* meant "obviously . . . communication or dialogue about the subject matter of the criminal investigation." *Id.* at 2839 (Marshall, J., dissenting) (emphasis deleted).

1045. Justice Marshall noted that, "unless the accused himself initiates further communication with the police, a valid waiver of the right to counsel cannot be established." *Id.* at 2840 n.2 (Marshall, J., dissenting).

The defendant in *United States v. Ramirez*¹⁰⁴⁶ argued that his confession should not have been admitted into evidence because the government had failed to show that he waived his *Miranda* rights and gave his statements voluntarily.¹⁰⁴⁷ The Ninth Circuit agreed that, before any incriminating statements are admitted into evidence, the prosecution must first lay a foundation that the defendant had been given proper *Miranda* warnings, and that these rights were then knowingly and voluntarily waived.¹⁰⁴⁸ The court found that the district court erred in admitting evidence of the defendant's inculpatory statements before a showing that he had made a valid waiver of his fifth amendment rights. The Ninth Circuit determined that it was not reversible error, however, because it was harmless beyond a reasonable doubt.¹⁰⁴⁹

5. Voluntariness of statements

Whether or not *Miranda* warnings have been given, any statement volunteered by a suspect may be used against him or her in a criminal proceeding. As long as the statement was made freely and without any coercive influences, it will be found to be voluntarily made and, therefore, admissible into evidence.¹⁰⁵⁰ That determination will be reversed by the reviewing court only if it is clearly erroneous.

The defendant in *United States v. DeLuca*¹⁰⁵¹ had not been given

1046. 710 F.2d 535 (9th Cir. 1983).

1047. *Id.* at 542. The defendant confessed to his participation in conspiracy to steal two airplanes which were used to smuggle contraband into the country; he was subsequently convicted of foreign transportation of stolen aircraft in violation of 18 U.S.C. § 2312 (1976). 710 F.2d at 537-38.

1048. 710 F.2d at 542 (citing *United States v. Smith*, 638 F.2d 131, 133 (9th Cir. 1981) (when a confession or admission is admissible in evidence, the prosecution need only lay a foundation that "proper *Miranda* warnings were given and the elucidated rights were waived"); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) ("[A] valid waiver will not be presumed simply from . . . the fact that a confession was in fact eventually obtained.")).

1049. 710 F.2d at 542. The error was harmless because subsequent testimony by both the defendant and the government was adequate to show that the defendant had rights. *Id.*

In another case on the issue of waiver of *Miranda* rights, *United States v. Barrett*, 703 F.2d 1076 (9th Cir. 1983), the Ninth Circuit accepted the trial court's finding that the defendant had been given his *Miranda* rights and waived them. *Id.* at 1087. The trial court found the FBI agent's testimony more credible than the defendant's in making its determination. The Ninth Circuit held that this finding was not clearly erroneous and, therefore, did not disturb it on appeal. *Id.* The court did not address the question of whether the defendant was in custody or not. The trial court had found that he was neither in custody nor under arrest at the time he made the statements admitted into evidence. The court pointed out that, even if the defendant was in custody, he had been given the *Miranda* warnings and waived his rights and, therefore, it did not need to reach that question. *Id.*

1050. *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) ("Any statement given freely and voluntarily without compelling influences is, of course, admissible in evidence.").

1051. 692 F.2d 1277 (9th Cir. 1982).

Miranda warnings before he volunteered to federal agents that he was involved in criminal activity. The defendant was serving a prison sentence when interviewed by federal agents. Without being told of his fifth amendment rights, the defendant admitted setting several fires. Agents answered his request for immunity by stating that they promised only to inform the prosecutor of the defendant's cooperation. The defendant initiated a second meeting in which the agents reiterated the same promise to the defendant's second request for immunity. When his request for immunity was denied, the defendant was no longer willing to cooperate.¹⁰⁵² The Ninth Circuit affirmed the district court's conclusion that the admission was voluntarily made by the defendant in an attempt to get an offer of immunity.¹⁰⁵³

The defendant in *United States v. Brooklier*¹⁰⁵⁴ was convicted of conspiring to engage in racketeering acts in violation of the Racketeer Influenced and Corrupt Organizations statute.¹⁰⁵⁵ Statements that the defendant made to an FBI agent were admitted at trial. The defendant contended that he had been promised that his statements would be kept confidential if he cooperated with the agent.¹⁰⁵⁶ The district court found that there was no such binding agreement between the defendant and the agent.

The Ninth Circuit determined that there had been no offer of immunity. In the absence of an unconditional promise that the defendant's statements would be kept confidential, he was not immune from prosecution. Nor were the threats of a grand jury investigation and subpoena offers of immunity. The court noted that the defendant had been warned to be careful about what he said to the agent.¹⁰⁵⁷ Because the defendant's statements were obtained without coercion or threats, the court found them to be voluntary and, therefore, admissible into

1052. *Id.* at 1285.

1053. *Id.*

1054. 685 F.2d 1208 (9th Cir. 1982) (per curiam), *cert. denied*, 103 S. Ct. 1194 (1983).

1055. 18 U.S.C. § 1962 (1976) provides in pertinent part:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of . . . this section.

1056. 685 F.2d at 1217. After being subpoenaed to appear before a federal grand jury, the defendant called the FBI agent to request his help. Statements made by the defendant during conversations with the agent were admitted at trial. *Id.*

1057. *Id.* at 1217-18.

evidence at trial.¹⁰⁵⁸

In *Jones v. Cardwell*,¹⁰⁵⁹ the Ninth Circuit found that the statements made by the defendant in a presentence interview initiated by the defendant's probation officer were not voluntary.¹⁰⁶⁰ The defendant's confession of other criminal activity obtained during the interview was used by the judge in imposing sentence. The district court found that the admissions were not spontaneous, but were made as a result of the probation officer's questions—questions the defendant was instructed that he had "no choice but to answer."¹⁰⁶¹ The Ninth Circuit held that, because the state was "aggressive" in obtaining the statements without warning the defendant that they could be used in determining his sentence, the admissions were involuntary. Therefore, consideration of the involuntary confession by the sentencing judge was a violation of the defendant's fifth amendment rights.¹⁰⁶²

In *United States v. Allen*,¹⁰⁶³ FBI agents went to the defendant's home with a warrant to search for firearms. The district court found that the defendant volunteered a request for the agents to be careful of three of his rifles before the agents asked him any questions. The lower court had based its finding that the defendant's request was voluntary on the credibility of the agent's testimony.¹⁰⁶⁴ The Ninth Circuit did not find this determination to be clearly erroneous and, therefore, upheld the district court's finding that the statement was made voluntarily by the defendant.¹⁰⁶⁵

The court in *United States v. Manuel*¹⁰⁶⁶ found that the defendant's confession was voluntary, even though there was an eighteen hour delay between his arrest and interrogation.¹⁰⁶⁷ The defendant urged

1058. *Id.* at 1218.

1059. 686 F.2d 754 (9th Cir. 1982).

1060. *Id.* at 757. The court first determined that the fifth amendment privilege against self-incrimination applied to the defendant's statements made during the presentence interview. See *supra* notes 1006-12 and accompanying text.

1061. 686 F.2d at 757. The defendant was instructed in writing that he was being interviewed "under court order and it [was] imperative that [defendant] follow all instructions, both in writing and as given verbally." These instructions were also read to him at the time of questioning. *Id.* The Ninth Circuit did not find that the district court's factual determinations were clearly erroneous. *Id.*

1062. *Id.*

1063. 699 F.2d 453 (9th Cir. 1982).

1064. *Id.* at 459.

1065. *Id.* at 459-60.

1066. 706 F.2d 908 (9th Cir. 1983).

1067. *Id.* at 914. The defendant was arrested in the afternoon while he was intoxicated. The arresting officers took him to the police station and, because of his condition, waited until the next day before questioning him.

that his confession should have been suppressed under the rule of *McNabb-Mallory*,¹⁰⁶⁸ which states that a confession obtained from a criminal suspect held in federal custody who is not arraigned "without unnecessary delay" may not be used at trial.¹⁰⁶⁹

Instead of the *McNabb-Mallory* rule, the court applied 18 U.S.C. section 3501¹⁰⁷⁰ in deciding the voluntariness issue. According to section 3501(b), pre-arraignment delay is the first of several factors a trial judge must consider in determining whether a confession was voluntarily made.¹⁰⁷¹ The court decided that under its holding in *United States v. Halbert*,¹⁰⁷² wherein it analyzed the legislative intent of section 3501,¹⁰⁷³ that in the circumstances involved in *Manuel*, the delay was

1068. *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). In *McNabb*, the Supreme Court held that confessions obtained from the defendants had to be excluded from evidence. 318 U.S. at 341. The defendants were arrested for the murder of a federal officer. They were held in a detention room and questioned over a two-day period until officers were satisfied with their story. The Court did not reach the constitutional issue but, instead, rested its decision on its supervisory authority over federal criminal prosecutions. Because the defendants were not taken before a committing magistrate with reasonable promptness, as "explicitly commanded" by Congress, the Court held that the defendants' detention was unlawful and the resulting confessions inadmissible. *Id.* at 340-45.

The Court used this same rationale in *Mallory*, holding that the defendant's confession had to be excluded. 354 U.S. at 455-56. The arresting officers did not take the defendant before a magistrate until after he had been detained for several hours and had finally confessed following a lie-detector test. The Court emphasized that an arrested suspect "is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." *Id.* at 454. The Court found that the extended delay in arraigning the defendant violated the standard of FED. R. CRIM. P. 5(a). 354 U.S. at 456. See *infra* note 1069.

1069. FED. R. CRIM. P. 5(a) provides in pertinent part: "An officer making an arrest . . . shall take the arrested person without unnecessary delay before the nearest available federal magistrate or . . . before a state or local judicial officer . . ."

1070. 18 U.S.C. § 3501 (1976) provides in pertinent part:

(a) In any criminal prosecution brought by the United States . . . , a confession . . . shall be admissible in evidence if it is voluntarily given. . . .

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment

Section 3501 was enacted as part of the Title II Omnibus Crime Control and Safe Streets Act of 1969, intended to supersede the *McNabb-Mallory* rule as the source of federal supervisory power to suppress confessions obtained in violation of Rule 5(a). 706 F.2d at 912.

1071. See *supra* note 1070.

1072. 436 F.2d 1226 (9th Cir. 1970).

1073. The court concluded from the legislative history of § 3501 that: (1) a confession obtained during a period less than six hours after arrest of the suspect is admissible per se, unless found to be inadmissible for reasons other than delay; (2) a confession obtained during a period greater than six hours after arrest of the suspect is not inadmissible per se.

not unreasonable per se. Therefore, the court found that the confession was voluntary.¹⁰⁷⁴

6. Witness immunity

When a witness refuses to testify based on his or her privilege against self-incrimination, the prosecutor may request immunity for the witness in order to gain the witness' testimony at trial. The traditional form of immunity, transactional immunity, protects the witness from ever being prosecuted for any offense to which he or she testifies.¹⁰⁷⁵ Another form of immunity, use immunity, protects the witness from use of his or her testimony and any "fruits" derived from it, in any criminal proceeding; however, the witness is not immune from prosecuting for any offense related to the subject matter of the testimony.¹⁰⁷⁶ Recently, courts have been willing to grant immunity to defense witnesses in certain circumstances, such as when the witness refuses to testify due to prosecutorial misconduct.¹⁰⁷⁷

The Ninth Circuit ruled in *United States v. Lord*¹⁰⁷⁸ that a defense witness may be granted use immunity when the witness invokes his or her fifth amendment privilege against self-incrimination in response to prosecutorial misconduct.¹⁰⁷⁹ In *Lord*, a witness who could provide testimony relevant to the defense refused to do so, asserting that he

However, an unreasonable delay in excess of six hours may itself be found to make the confession involuntary. 706 F.2d at 913 (citing *Halbert*, 436 F.2d at 1233-37).

1074. 706 F.2d at 914.

1075. L. TAYLOR, WITNESS IMMUNITY 4 (1983).

1076. *Id.* at 4, 79; *United States v. Lord*, 711 F.2d 887, 890 (9th Cir. 1983).

1077. 711 F.2d at 890, *see infra* notes 1078-85 and accompanying text. *See also* *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), *infra* note 1083; *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) (defendant's due process rights violated where prosecutor's intimidation induced defense witness to invoke her privilege against self-incrimination).

1078. 711 F.2d 887 (9th Cir. 1983).

1079. *Id.* at 890. 18 U.S.C. § 6002 (1976) provides in pertinent part:

[T]he witness may not refuse to comply with [an order by the court] on the basis of his privilege against self-incrimination; but no testimony . . . may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement

(a) [The] district court . . . shall issue . . . upon the request of the United States attorney . . . any order requiring such an individual to give testimony . . . which he refuses to give or provide on the basis of his privilege against self-incrimination

18 U.S.C. § 6003 (1976) provides in pertinent part:

(b) A United States attorney may . . . request an order . . . when in his judgment—

(1) the testimony . . . from such an individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify . . . on the basis of his privilege against self-incrimination.

feared criminal prosecution if he testified.¹⁰⁸⁰ The government refused to grant the witness any immunity at the trial.

The Ninth Circuit adopted the standard outlined in *United States v. Herman*,¹⁰⁸¹ requiring the defendant to show that the government's refusal to grant use immunity to a defense witness was done " 'with the deliberate intention of distorting the judicial fact finding process.' " ¹⁰⁸² Upon such a finding, the court must enter a judgment of acquittal for the defendant, unless the prosecutor grants use immunity to the witness.¹⁰⁸³ Here, the court found a prima facie showing that the witness' testimony would be relevant, and that the prosecutor's pretrial remarks to the witness could be determined to be a distortion of the fact-finding process.¹⁰⁸⁴ Therefore, the court remanded for an evidentiary hearing to determine "whether the prosecutor intentionally distorted the fact-finding process by deliberately causing [the witness] to invoke his fifth amendment privilege."¹⁰⁸⁵

7. Defendant's right not to testify

In addition to the privilege against self-incrimination, the fifth amendment also grants a criminal defendant the privilege of not having to take the witness stand to testify. The United States Supreme Court in *United States v. Hasting*¹⁰⁸⁶ reiterated the principle announced

The Ninth Circuit emphasized that the rationale for extending use immunity to defense witnesses is to protect the defendant's due process right to a fair trial. 711 F.2d at 890, 892. See *United States v. Carman*, 577 F.2d at 556, 561 (9th Cir. 1977) ("A defendant has no absolute right to elicit testimony from any witness . . . whom he may desire. . . . [T]he key issue in the due process analysis remains whether or not the defendant was denied a fair trial." (citation omitted)).

1080. 711 F.2d at 889.

1081. 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

1082. 711 F.2d at 890 (quoting *Herman*, 589 F.2d at 1204).

1083. *Id.* at 891-92 (citing *Virgin Islands v. Smith*, 615 F.2d 964, 969 (3d Cir. 1980) (if district court found evidence that prosecutorial misconduct prevented defense witness from giving relevant testimony, defendant must be acquitted unless use immunity extended to witness)).

1084. A prima facie showing was made, first, because the witness' testimony would be relevant to corroborate the defendant's version of events, and also relevant to the defendant's defense of entrapment. Second, the prosecutor had told the witness before trial of the privilege against self-incrimination and that the witness would not be prosecuted if he testified truthfully at trial. The witness understood the prosecutor's remarks concerning the truthfulness of his testimony to mean that he could be prosecuted "depend[ing] on his testimony." *Id.* at 891.

1085. *Id.* The district court was directed to enter an acquittal for the defendant if it found such prosecutorial misconduct by a preponderance of the evidence, unless the prosecutor ordered use immunity for the defense witness at a new trial. *Id.* at 892-93.

1086. 103 S. Ct. 1974 (1983).

in *Chapman v. California*,¹⁰⁸⁷ that a violation of a defendant's fifth amendment right not to testify does not require automatic reversal, but may be deemed harmless in some circumstances.¹⁰⁸⁸ In *Hasting*, the defendants did not testify at trial. While not making a direct statement on the defendants' failure to take the stand, the prosecution commented during summation on the scanty evidence presented and the inconsistent defense theories offered by the defendants.¹⁰⁸⁹ The court of appeals reversed the defendants' subsequent convictions.¹⁰⁹⁰

The Court determined that the lower court had erred in not applying the harmless error doctrine of *Chapman*.¹⁰⁹¹ The Court concluded that a review of the whole record¹⁰⁹² showed "overwhelming evidence of guilt" so that, even if the prosecution violated the defendants' fifth amendment right not to testify, the error was harmless beyond a reasonable doubt.¹⁰⁹³

B. The Right to Counsel

1. The right to appointed counsel

The Supreme Court in *Gideon v. Wainwright*¹⁰⁹⁴ recognized an indi-

1087. 386 U.S. 18 (1967).

1088. In *Chapman*, the Court rejected a per se rule of automatic reversal and held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.* at 22 (emphasis deleted).

1089. 103 S. Ct. at 1977. The defendants were charged with kidnapping, transporting women across state lines for immoral purposes, and conspiring to commit such offenses. *Id.* at 1976-77. The defendants relied on two defenses: consent, and mistaken identity. In commenting on the defendants' evidence during summation, the prosecution pointed out what the defendants did not offer into evidence. The defendants' motion for mistrial was denied. Each defendant was convicted by the jury on all counts. *Id.* at 1977.

1090. *Id.* (citing *Griffin v. California*, 380 U.S. 609 (1965)). The Court held in *Griffin* that prosecutorial comment on a defendant's failure to testify was a violation of the defendant's fifth amendment right against self-incrimination. 380 U.S. at 615. The lower court in *Hasting* found that even without direct comment on the defendants' failure to testify, a *Griffin* error occurred. 103 S. Ct. at 1977.

1091. The lower court stated that the application of the *Chapman* harmless error rule would "impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights." 103 S. Ct. at 1977 (quoting *United States v. Hasting*, 660 F.2d 301, 303 (7th Cir. 1981) (per curiam)).

1092. The Court exercised its power to examine the record to evaluate a harmless error claim (citing *Harrington v. California*, 395 U.S. 250, 254 (1969) (reviewing court must determine whether it is clear beyond a reasonable doubt that trier of fact would have returned a verdict of guilty, absent alleged error)).

1093. 103 S. Ct. at 1982. The Court relied on the lower court's acknowledgment of the "clear evidence of guilt," *Id.* (quoting *Hasting*, 660 F.2d at 303), and the inconsistency of the defendants' defense in making its determination. *Id.* at 1982.

1094. 372 U.S. 335 (1963).

gent defendant's constitutional right to have court-appointed counsel in all felony cases.¹⁰⁹⁵ The sixth amendment right to effective assistance of counsel¹⁰⁹⁶ has since been held to apply to any case in which the defendant is sentenced to imprisonment.¹⁰⁹⁷

In *Morris v. Slappy*,¹⁰⁹⁸ the Supreme Court, in dicta, disagreed with the Ninth Circuit's conclusion that the right to counsel enjoyed by indigent defendants includes the right to have a "meaningful relationship" with his or her attorney.¹⁰⁹⁹ In *Slappy*, the defendant was assigned a deputy public defender who represented him at his preliminary hearing and undertook an extensive pretrial investigation. Six days prior to trial, a senior trial attorney was substituted to represent Slappy because the deputy public defender had been hospitalized for emergency surgery. During the six days prior to trial, the newly-appointed attorney interviewed Slappy and advised him of the attorney substitution, reviewed the files and investigation prepared by the deputy public defender, and subsequent to his review again met with Slappy on three occasions. On both the first and second day of trial, Slappy complained to the court that his new attorney, Hotchkiss, had not had sufficient time to prepare the case.¹¹⁰⁰ The court reviewed the circumstances of Hotchkiss' appointment and questioned him. Hotchkiss informed the court that he was prepared for trial. Convinced that Hotchkiss was prepared, the court construed Slappy's statements as

1095. *Id.* at 345. The *Gideon* Court held that the fourteenth amendment incorporates the sixth amendment right to appointed counsel, and that, therefore, the right is guaranteed in state felony cases. *Id.* at 342. An indigent defendant's constitutional right to have appointed counsel in federal felony cases was previously established in *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938).

1096. See *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). The *McMann* Court recognized a defendant's right to effective assistance of counsel. The Court stated, however, that it is within the trial courts' discretion to establish the proper standards of attorney performance necessary to guarantee the right. *Id.* at 771. For a discussion of the standard used by the Ninth Circuit, see *infra* notes 1158-59 and accompanying text.

1097. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1971). In *Argersinger*, the defendant was charged with carrying a concealed weapon. He was not represented by counsel at his trial, and was convicted and sentenced to ninety days in jail. *Id.* at 26. The Supreme Court reversed the conviction and held that unless a person makes a valid waiver of his or her right to counsel, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37.

1098. 103 S. Ct. 1610 (1983).

1099. *Id.* at 1616.

1100. *Id.* at 1613-14. On the first day of trial, Slappy stated that he was "'satisfied with the Public Defender [Hotchkiss]. . . .'" *Id.* at 1613 (emphasis in original). On the second day, Slappy again stated his attorney was not prepared but stated, "'I don't have anything against him.'" *Id.* at 1614 (emphasis in original).

motions for a continuance and denied them.¹¹⁰¹ On the third day of trial, Slappy presented the court with a pro se petition claiming, for the first time, that he was unrepresented. Slappy claimed that the initial deputy public defender was his attorney and he refused to cooperate with Hotchkiss.¹¹⁰² Slappy's first trial ended in a mistrial on two counts and a guilty verdict on three counts. A second trial, at which an uncooperative Slappy was again represented by Hotchkiss, resulted in a guilty conviction on the remaining two counts.¹¹⁰³

The conviction on all five counts was affirmed by the California Court of Appeal and the California Supreme Court denied review.¹¹⁰⁴ The district court denied Slappy's pro se petition for a writ of habeas corpus, finding that the trial court had not abused its discretion by denying either a continuance to allow Hotchkiss additional time to prepare or a continuance to permit the original public defender to represent Slappy.¹¹⁰⁵ The Ninth Circuit reversed, holding that the sixth amendment right to counsel includes the right to a meaningful attorney-client relationship.¹¹⁰⁶ The court concluded that because the trial court failed to balance Slappy's interest in continued representation by the original public defender against the state's interest in proceeding with the trial, Slappy's right to counsel was violated.¹¹⁰⁷

The Supreme Court held that the trial judge did not abuse his discretion by denying Slappy's motion for a continuance to give Hotchkiss additional preparation time.¹¹⁰⁸ The Court also held that Slappy failed to make a timely motion for a continuance based on the deputy public defender's unavailability.¹¹⁰⁹

While the Court unanimously agreed that Slappy failed to make a timely motion for substitution of attorney,¹¹¹⁰ the Court was divided on the issue of the right to counsel. Justice Blackmun, with whom Justice

1101. *Id.*

1102. *Id.* at 1614-15. Following his claim of no representation, Slappy refused to cooperate with Hotchkiss and ignored his attorney's advice to take the stand. *Id.*

1103. *Id.*

1104. *Id.* The district court agreed with the trial judge's conclusion that Hotchkiss had sufficient time to prepare for the trial. The district court also concluded that the need for efficient administration of justice reasonably precluded a continuance to permit the deputy public defender to recover from surgery and represent Slappy. *Id.*

1105. *Id.*

1106. *Id.* at 1615-16. The Ninth Circuit, having concluded that Slappy's right to counsel was violated, went on to hold that Slappy need not show prejudice for a reversal. *Id.* at 1616.

1107. *Id.*

1108. *Id.* at 1616-17.

1109. *Id.* at 1617.

1110. *Id.* at 1620 (Brennan, J., concurring); *id.* at 1625 (Blackmun, J., concurring).

Stevens joined, declined to address the issue, stating that because no timely motion was made any such discussion was unnecessary.¹¹¹¹ The majority read the Ninth Circuit opinion broadly and construed the decision to imply that a defendant's sixth amendment right to counsel includes a right to a "meaningful relationship" with his or her attorney.¹¹¹² The Court noted that there was no authority cited for the Ninth Circuit's position and, accordingly, rejected the claim. The Court stated that no court could "guarantee" a meaningful relationship with one's attorney, whether the attorney be privately retained or appointed.¹¹¹³

Justice Brennan, with whom Justice Marshall joined, disagreed with the majority's characterization of the Ninth Circuit decision. Justice Brennan interpreted the decision as providing a qualified right to continued representation by an attorney once the defendant expresses the interest in doing so.¹¹¹⁴ This right, although not "absolute," would be balanced against those existing factors that weigh in favor of proceeding even in the particular attorney's absence.¹¹¹⁵

Justice Brennan cited several cases in support of his position.¹¹¹⁶ While Justice Brennan noted that each case involved retained counsel rather than appointed counsel, he stated that the distinction does not warrant precluding continued representation for an indigent defend-

1111. *Id.* at 1625 (Blackmun, J., concurring).

1112. *Id.* at 1617.

1113. *Id.*

1114. *Id.* at 1623 (Brennan, J., concurring).

1115. *Id.* (Brennan, J., concurring).

1116. *Id.* at 1621 (Brennan, J., concurring). *See, e.g.,* *Releford v. United States*, 288 F.2d 298, 299-301 (9th Cir. 1961) (defendant's conviction reversed because trial judge's insistence that an attorney, not chosen by defendant, represent defendant when retained counsel was hospitalized violated defendant's right to counsel of his choice); *Gandy v. Alabama*, 569 F.2d 1318, 1327 (5th Cir. 1978) (denial of a continuance to permit retained counsel to conduct trial was a due process violation because defendant was forced to proceed with trial counsel who was neither chosen by the defendant nor prepared for trial); *Linton v. Perini*, 656 F.2d 207, 209-11 (6th Cir. 1981) (denial of a continuance which retained counsel needed for trial preparation, and court appointment of substitute counsel following retained counsel's withdrawal, violated defendant's right to counsel of his choice), *cert. denied*, 456 U.S. 983 (1982); *United States v. Seale*, 461 F.2d 345, 356-61 (7th Cir. 1972) (failure to grant a continuance to permit defendant time to hire substitute retained counsel violated defendant's right to counsel of his choice). *Cf. United States v. Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978) (not an abuse of discretion to deny a continuance to retain additional counsel once fair and reasonable opportunity to retain adequate counsel is given, if delay would be unreasonable), *cert. denied*, 439 U.S. 1069 (1979); *Giocalone v. Lucas*, 445 F.2d 1238, 1240-43 (6th Cir. 1971) (no constitutional violation caused by denial of continuance to permit lead counsel to try case because requested continuance was open-ended and defendant did not object to the attorneys who represented him even though neither attorney was chosen by the defendant), *cert. denied*, 405 U.S. 922 (1972).

ant.¹¹¹⁷ Additionally, the cases are distinguishable on another ground: they involved the defendants' right to counsel of their choosing, a right that indigent defendants do not enjoy.¹¹¹⁸ Justice Brennan recognized that a state's interest in economy and efficiency may preclude permitting an indigent defendant from choosing his or her own counsel.¹¹¹⁹ He did not believe, however, that the interest outweighed an indigent defendant's interest in continuing a relationship with an attorney with whom a relationship of trust and confidence had developed.¹¹²⁰ Justice Brennan stated that recognition of a qualified right to continued representation would impose only a minimal burden on the trial courts by requiring them to balance the defendant's interest in continuing the attorney-client relationship against the state's interest in proceeding; the decision would be subject to an abuse of discretion standard of review.¹¹²¹

Justice Brennan also agreed with the Ninth Circuit's holding that once a violation occurred because the trial court failed to balance the interests involved, the defendant should not be required to show prejudice for a reversal.¹¹²² He reasoned that because there would be no way to determine whether the trial would have proceeded differently if the deputy public defender, instead of Hotchkiss, had represented Slappy, any inquiry into the question would be "unguided speculation."¹¹²³ In conclusion, Justice Brennan noted that indigent criminal

1117. 103 S. Ct. at 1622 (Brennan, J., concurring).

1118. *Id.* at 1622 n.5 (Brennan, J., concurring).

1119. *Id.* (citing Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974)). Tague also identifies fairness, orderliness, and protection of the bar as legitimate governmental concerns. Tague, *supra*, at 99. Although the article recognizes various legitimate governmental concerns that should be balanced against an indigent defendant's interest in selecting his or her own counsel, it concludes by stating that there are less intrusive ways to protect the various interests and that, therefore, an indigent defendant should have the opportunity to choose his or her own attorney. *Id.* Justice Brennan, however, recognized that governmental interests may preclude permitting an indigent defendant from choosing his or her own counsel, and conceded that certain state interests may outweigh an indigent's interest in continuing an attorney-client relationship. 103 S. Ct. at 1622 n.5 (Brennan, J., concurring).

1120. 103 S. Ct. at 1622 n.5 (Brennan, J., concurring).

1121. *Id.* at 1623 (Brennan, J., concurring).

1122. *Id.* at 1624 (Brennan, J., concurring).

1123. *Id.* (quoting *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978)). Justice Brennan stated that it would be reasonable to assume that the defendant suffered some prejudice because of an arbitrary denial of a continuance. He added, however, that relief should not be granted if the state shows existing factors which would have made the denial of the continuance reasonable. In this situation, the court's failure to inquire into the length of the attorney's unavailability and balance the defendant's interest in continued representation against the state's interest in proceeding would be harmless error. *Id.* at 1624-25 n.9 (Brennan, J., concurring).

defendants are "entitled to the enforcement of procedural rules that protect substantive rights guaranteed by the Constitution."¹¹²⁴

2. Effective assistance of counsel

a. on appeal

An indigent defendant's constitutional right to assistance of counsel on his or her first appeal as of right was established in *Douglas v. California*.¹¹²⁵ In *Douglas*, the Supreme Court ruled that a meaningful appeal is dependent on having the benefits of an attorney's "examination into the record, research of the law, and marshalling of arguments on [the client's] behalf."¹¹²⁶ In *Anders v. California*,¹¹²⁷ the Court refined this rule and held that the attorney must vigorously and competently argue the appeal.¹¹²⁸ Additionally, the *Anders* Court held that an attorney may not withdraw from an appeal if there is anything in the record that "arguably" supports the appeal.¹¹²⁹

Recognizing that *Anders* compels attorneys to argue nonfrivolous appeals, the Second Circuit recently held that *Anders* also mandates that an attorney argue on appeal any nonfrivolous claims requested by the defendant.¹¹³⁰ The Supreme Court, in *Jones v. Barnes*,¹¹³¹ rejected this Second Circuit extension of *Anders*, however, and held that the attorney's decision not to argue claims requested by the defendant did not violate the defendant's right to effective assistance of counsel.¹¹³² In *Jones*, the defendant, Barnes, was convicted of robbery and assault.¹¹³³ Michael Melinger was assigned to represent Barnes on ap-

1124. *Id.* at 1625 (Brennan, J., concurring).

1125. 372 U.S. 353, 357 (1963).

1126. *Id.* at 358.

1127. 386 U.S. 738 (1967).

1128. *Id.* at 744.

1129. *Id.* In *Anders*, the defendant was convicted of possession of marijuana, a felony. His court-appointed counsel concluded from a review of the record and a discussion with the client that there was no merit to the appeal. The attorney informed the court of his conclusion and of *Anders*' desire to file a pro se brief. *Id.* at 739-40. The *Anders* Court held that an attorney may not abandon a nonfrivolous appeal. The Court nevertheless indicated that, if an attorney finds the case to be completely frivolous, he or she may advise the court of the finding, file a brief that refers to anything in the record that might support the appeal, and request the court's permission to withdraw from the case. *Id.* at 744.

1130. *Barnes v. Jones*, 665 F.2d 427, 433 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983). See *supra* note 1129.

1131. 103 S. Ct. 3308 (1983).

1132. *Id.* at 3313-14.

1133. *Id.* at 3310. Barnes' arrest was based on the victim's statement that he recognized one of his assailants as a person known as "Froggy" and on a physical description of the assailant. Barnes was known as "Froggy." *Id.*

peal.¹¹³⁴ Barnes sent Melinger a letter suggesting several claims he felt should be raised on appeal, as well as a copy of a pro se brief he had written.¹¹³⁵ Melinger then sent Barnes a list of seven claims he was considering asserting on appeal.¹¹³⁶ In the appellate brief, Melinger asserted three of the seven listed claims. Melinger also submitted Barnes' pro se brief. Subsequently, Barnes submitted two additional pro se briefs in which he raised three more of the seven claims Melinger had considered but had not included in his brief.¹¹³⁷ At oral argument, Melinger argued only the three claims presented in his brief. He did not mention any of the claims set forth in the pro se briefs. Barnes' conviction was affirmed by summary order.¹¹³⁸

Barnes filed a habeas corpus petition in which he claimed ineffective assistance of appellate counsel.¹¹³⁹ Concluding that there was no basis in the record for the claim, the district court dismissed the petition.¹¹⁴⁰ The Second Circuit reversed, holding that appellate counsel must, to the best of his professional ability, argue additional colorable points requested by the defendant.¹¹⁴¹ The circuit court construed *Anders v. California*¹¹⁴² as barring appellate counsel from abandoning both nonfrivolous appeals and nonfrivolous issues.¹¹⁴³

Writing for the majority, Chief Justice Burger characterized the Second Circuit decision as a per se rule requiring appellate counsel to raise every nonfrivolous issue requested by the client.¹¹⁴⁴ He stated that the Second Circuit's interpretation of *Anders* in fact contravened

1134. *Id.*

1135. *Id.*

1136. *Id.* Melinger included some of the claims listed in Barnes' letter; however, Melinger rejected most of the claims because he thought that they would not be helpful in obtaining a new trial and were not based on evidence in the trial record. *Id.*

1137. *Id.* at 3311.

1138. *Id.* The New York Court of Appeals denied Barnes' leave to appeal the summary order. *Id.*

1139. *Id.* Prior to filing this habeas corpus petition, Barnes had challenged his conviction in both federal and state courts claiming, among other things, ineffective assistance of trial counsel. *Id.*

1140. *Id.* Before denying Barnes' petition, the district court determined that Barnes had exhausted his state remedies. *Id.*

1141. *Id.* By the time the Second Circuit heard Barnes' case, at least twenty-six state and federal judges had rejected Barnes' claim that he was unjustly convicted. *Id.* at 3311 n.3.

1142. 386 U.S. 738 (1967).

1143. 103 S. Ct. at 3311. The Court stated the Second Circuit had held "when the 'appellant requests that [his attorney] raise additional colorable points [on appeal], counsel *must* argue the additional points to the full extent of his professional ability.'" *Id.* (quoting *Barnes v. Jones*, 665 F.2d 427, 433 (2d Cir. 1981) (emphasis added by the Court)).

1144. *Id.* at 3312.

the *Anders* decision.¹¹⁴⁵ Chief Justice Burger noted that the appellate attorney's role requires him or her to use professional judgment to select the most important issues for review¹¹⁴⁶ and to avoid diluting the impact of the important issues by adding weak arguments.¹¹⁴⁷ He concluded that the *per se* rule announced by the Second Circuit would restrict vigorous and effective advocacy and, thus, would thwart the goal behind the *Anders* decision.¹¹⁴⁸

In his concurring opinion, Justice Blackmun opined that a lawyer has an ethical duty to raise nonfrivolous claims requested by the client even if, in the lawyer's judgment, the claims are unlikely to succeed.¹¹⁴⁹ However, Justice Blackmun agreed with the majority that this ethical consideration does not amount to a constitutional duty.¹¹⁵⁰

Justice Brennan, with whom Justice Marshall joined, dissented.¹¹⁵¹ Relying on the sixth amendment guarantee of "assistance of counsel," Justice Brennan believed that a defendant, not his or her attorney, is afforded the right to decide which nonfrivolous issues should be presented on appeal.¹¹⁵² Accordingly, Justice Brennan would have remanded the case for a determination of whether Barnes actually insisted that Melinger brief the requested nonfrivolous issues.¹¹⁵³ If Barnes did insist that the issues be briefed, and the court found that Barnes was dissatisfied with merely filing his *pro se* briefs, Justice Brennan indicated that he would conclude that Barnes was deprived of his right to assistance of counsel.¹¹⁵⁴

1145. *Id.* at 3313.

1146. *Id.* at 3312.

1147. *Id.* at 3313 (citing Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMP. L.Q. 115, 119 (1951); R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* 266 (1981)).

1148. *Id.* at 3314.

1149. *Id.* (Blackmun, J., concurring). Justice Blackmun noted the similar position adopted by the American Bar Association. *Id.* (Blackmun, J., concurring) (citing ABA Standards for Criminal Justice, Criminal Appeals, Standard 21-3.2, Comment, 21-42 (2d ed., 1980)).

1150. *Id.* at 3314 (Blackmun, J., concurring).

1151. *Id.* (Brennan, J., dissenting).

1152. *Id.* at 3316 (Brennan, J., dissenting) ("[T]he right to 'assistance of counsel' carries with it a right, personal to the defendant, to make [the] decision, against the advice of counsel if he chooses.").

1153. *Id.* at 3319 (Brennan, J., dissenting). For purposes of review, the majority assumed that Barnes did not merely accept Melinger's decision but, instead, insisted that Melinger raise the issues he requested. *Id.* at 3312 n.4.

1154. *Id.* at 3319 (Brennan, J., dissenting). Justice Brennan strongly disagreed with the analysis of the majority opinion. Although he agreed with the majority's description of good appellate advocacy, Justice Brennan proffered his belief that the majority placed too much emphasis on the interest of the state and too little emphasis on the client's interest. *Id.* at 3317-18 (Brennan, J., dissenting). Therefore, Justice Brennan stated, "any restriction on

b. at trial

An accused's constitutional right to counsel¹¹⁵⁵ includes the right to effective assistance of trial counsel.¹¹⁵⁶ Standards for determining the requisite attorney performance are established by the trial courts. Although given broad discretion, the Supreme Court has admonished trial courts from establishing standards that would permit a defendant's case to be handled by an incompetent attorney.¹¹⁵⁷ The standard used in the Ninth Circuit, established in *Cooper v. Fitzharris*,¹¹⁵⁸ is a two-prong test that requires a defendant to show, first, attorney errors or omissions which reflect a failure to act as a reasonably competent, conscientious criminal attorney and, second, prejudice to his or her defense resulting from the attorney's conduct.¹¹⁵⁹

In *United States v. Gibson*,¹¹⁶⁰ the Ninth Circuit, applying the *Cooper* test, held that the defendant's failure to show counsel errors that prejudiced his defense precluded relief on a claim of ineffective

individual autonomy and dignity should be limited to the minimum necessary to vindicate the State's interest in a speedy, effective prosecution." *Id.* at 3318 (Brennan, J., dissenting).

1155. The sixth amendment to the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . assistance of counsel for his defense." In *Powell v. Alabama*, 287 U.S. 45, 71-73 (1932), the Court recognized the constitutional right to court-appointed counsel where an indigent defendant is accused of a capital offense, is unable to employ counsel, and is incapable of adequately representing himself because of ignorance, illiteracy, feeble-mindedness, or the like. The Court's decision in *Powell* was extended in *Gideon v. Wainwright*, 372 U.S. 335 (1963), to include any defendant charged with a felony.

1156. *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (constitutional guarantee of right to counsel includes right of a defendant facing felony charges to be represented by effective counsel; counsel's effectiveness is determined by whether advice given is within range of competence expected of attorneys in criminal cases).

1157. *Id.*

1158. 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

1159. *Id.* at 1330-31. In *Cooper*, the Ninth Circuit expressly rejected a requirement that a conviction could be overturned on a claim of ineffective assistance of counsel, only if the attorney's conduct made the trial a "farce and mockery." *Id.* at 1328-29. Instead, the Ninth Circuit standard of review now requires that a defendant receive assistance of counsel that reflects the level of competence expected from a reasonably competent criminal defense attorney. The standard required is consistent with that established by the Supreme Court in *McMann v. Richardson*, *supra* note 1156. Additionally, the Ninth Circuit standard requires that it appear that the defendant was prejudiced by the errors or omissions claimed to be the result of the ineffective assistance of counsel. 586 F.2d at 1331. The prejudice requirement is consistent with the Supreme Court's opinion in *Chambers v. Maroney*, 399 U.S. 42 (1970). In *Chambers*, the Supreme Court affirmed the Third Circuit's denial of relief on a claim of ineffective assistance of counsel. The denial was premised on a finding that the error complained of was harmless and, therefore, did not prejudice the defendant's defense. *Id.* at 53-54.

1160. 690 F.2d 697 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1446 (1983).

assistance of counsel.¹¹⁶¹ In *Gibson*, the defendant was convicted of mail fraud, wire fraud, and inducing people to travel interstate for fraudulent purposes.¹¹⁶² On appeal, the defendant listed nineteen instances where his trial counsel failed to object or move to strike certain testimony as the basis for his claim of ineffective assistance of counsel.¹¹⁶³ The court rejected the defendant's claim because he failed to meet the second prong of the *Cooper* test. The defendant failed to show that the listed errors and omissions prejudiced his defense.¹¹⁶⁴

In *United States v. Christopher*,¹¹⁶⁵ the court held that counsel's failure to object to the defendant's absence at his arraignment and trial did not prejudice the defendant's defense.¹¹⁶⁶ The defendant was convicted of misdemeanor charges of being present on federal property after normal working hours.¹¹⁶⁷ Although the defendant's absence from his arraignment could not be explained, the trial court decided to proceed with his trial. The defendant's attorney did not object to the court's decision to proceed in his client's absence.¹¹⁶⁸

On appeal, the defendant contended that his attorney's failure to object to his absence at the trial violated his right to effective assistance

1161. *Id.* at 704. See *Hall v. Sumner*, 682 F.2d 186, 189 (9th Cir. 1982) (defendant's failure to meet first prong of *Cooper* test eliminated need to address second prong).

1162. 690 F.2d at 699.

1163. *Id.* at 703.

1164. *Id.*

1165. 700 F.2d 1253 (9th Cir.), *cert. denied*, 103 S. Ct. 2436 (1983).

1166. *Id.* at 1261. Although the court denied the defendant's ineffective assistance of counsel claim, the courts vacated his conviction because Michel's (one of the defendants) absence violated FED. R. CRIM. P. 43. The rule provides in pertinent part:

(c) A defendant need not be present in the following situations:

...

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

FED. R. CRIM. P. 43(c)(2). The Ninth Circuit found that Michel did not consent in writing to his absence at the arraignment. 700 F.2d at 1262. The court also held that the error was not harmless because the trial judge did not find that Michel had adequate notice of the charges against him to permit a finding that he voluntarily waived his right to attend the trial. Such a finding requires the defendant to answer the indictment by personally pleading in court. *Id.* (citing *United States v. Tortora*, 464 F.2d 1202, 1209 (2d Cir. 1972)).

1167. 700 F.2d at 1255. The defendant was a member of an organization whose goal was to pass the California Marijuana Initiative. The group set up a table on the corner of the federal property to collect petition signatures, distribute information, and to register voters. The group selected this site because there was pedestrian traffic and because it was close to a busy entertainment center, a commercial area, and the U.C.L.A. campus. The defendant was cited when he was asked to leave the federal property and he refused to do so. The citation was issued on the fourth night of the group's activity. *Id.* at 1256.

1168. *Id.*

of counsel.¹¹⁶⁹ The Ninth Circuit held that, while the attorney's omission was "significant," the defendant failed to show that his defense was prejudiced.¹¹⁷⁰ The court reasoned that the trial was brief and concerned only the question of the federal property's normal working hours, that only two witnesses appeared for the government and none for the defense, and therefore, the defendant's absence was not prejudicial.¹¹⁷¹ The court also stated that mere error on the part of the defendant's attorney is insufficient to warrant reversal. Thus, the Ninth Circuit reaffirmed its use of the *Cooper* standard.¹¹⁷²

In *United States v. Coleman*,¹¹⁷³ the Ninth Circuit considered the effect of cumulative attorney errors on the applicability of the *Cooper* test. In *Coleman*, the defendant was found guilty of conspiring to commit murder and conspiring to fraudulently collect life insurance proceeds.¹¹⁷⁴ At trial, his counsel insisted that a three hour tape, containing admissible and inadmissible damaging statements, be played in its entirety instead of the edited version offered by the government.¹¹⁷⁵ On appeal, Coleman argued that he was deprived of effective assistance of counsel, basing his contention on his attorney's decision to play the entire damaging tape as well as instances when the attorney failed to object to hearsay testimony and long, nonresponsive answers.¹¹⁷⁶

In considering the defendant's claim, the Ninth Circuit recognized the rule that trial attorneys have broad discretion in the use of trial tactics.¹¹⁷⁷ The court concluded that the attorney's decision, which the trial court construed as an attempt to minimize the tape's impact, was one of trial tactics and did not amount to attorney ineffectiveness.¹¹⁷⁸ The Ninth Circuit found that the additional errors merely permitted testimony that was of minimal significance to the trial.¹¹⁷⁹ The court recognized the need to consider the cumulative effect of all trial errors

1169. *Id.* at 1261.

1170. *Id.*

1171. *Id.*

1172. *Id.* For a discussion of the *Cooper* test, see *supra* notes 1158-59 and accompanying text.

1173. 707 F.2d 374 (9th Cir.), *cert. denied*, 104 S. Ct. 171 (1983).

1174. *Id.* at 375.

1175. *Id.* at 378.

1176. *Id.*

1177. *Id.* (citing *United States v. Larios*, 640 F.2d 938, 941 (9th Cir. 1981) (defendant claimed he was denied effective assistance of counsel because his attorney should have made motion to suppress illegally found evidence sooner; court characterized decision as one of trial tactics to be given broad discretion and held that, even if it was an error, it was not one that would not be made by a reasonably competent attorney)).

1178. *Id.*

1179. *Id.*

in evaluating a trial counsel's effectiveness,¹¹⁸⁰ but held that the errors of Coleman's attorney fell short of establishing a sixth amendment violation. Additionally, the court noted that the defendant failed to show that his defense was prejudiced, and therefore failed to satisfy either prong of the *Cooper* test.¹¹⁸¹

In *Hudson v. Rushen*,¹¹⁸² the Ninth Circuit held that the trial court's denial of a motion for substitution of attorney resulted in neither a denial of the defendant's right to counsel nor in a denial of his right to effective assistance of counsel. In *Hudson*, the defendant was convicted of kidnapping, forcible rape and forcible oral copulation, all committed while armed with a deadly weapon.¹¹⁸³ Following the prosecution's case-in-chief, the defendant made a motion for substitution of his appointed attorney. The court held a hearing out of the jury's presence, found the defendant's request to be without merit, and denied the motion.¹¹⁸⁴ The court adjourned the trial until the next morning to give the defendant and his attorney time to confer. The next morning, the attorney advised the court that his client would not participate in the trial at all. The defendant then told the court that he did not want his attorney to represent him, and that his attorney in effect was fired. The defendant, Hudson, was then removed from the courtroom.¹¹⁸⁵

The Ninth Circuit first considered whether Hudson was denied his constitutional right to counsel by the trial court's denial of his motion for substitution of attorney. The Ninth Circuit evaluated the propriety of the trial court's decision in light of the timeliness of Hudson's motion, the adequacy of the court's inquiry into the reasons for the motion, and the extent of the conflict that existed between Hudson and his attorney, Mr. Wong.¹¹⁸⁶ The Ninth Circuit found that Hudson's mo-

1180. *Id.* (citing *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979)). The defendant also attempted to raise a fifth amendment claim by contending his attorney's failure to raise the claim constituted ineffective assistance of counsel. The court said, however, that no reasonably competent attorney would have made the argument. *Id.*

1181. *Id.* Where there is overwhelming evidence of guilt in cases such as this, it is very difficult for a defendant to show prejudice and meet the second-prong of the *Cooper* test. *Id.* (citing *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981)).

1182. 686 F.2d 826 (9th Cir. 1982), cert. denied, 103 S. Ct. 1896 (1983).

1183. *Id.* at 828.

1184. *Id.*

1185. *Id.* at 829. The Ninth Circuit characterized Hudson's removal from the courtroom as an "obstreperous departure." *Id.* at 831.

1186. *Id.* (citing *United States v. Mills*, 597 F.2d 693, 700 (9th Cir. 1979)). In *Mills*, the Ninth Circuit held that the trial court did not abuse its discretion by denying Mills' motion to dismiss his attorney. The court based its decision on the following factors: (1) Mills'

tion, made after the conclusion of the prosecution's case-in-chief, would have resulted in a significant delay or mistrial, and that the trial court's inquiry was as "comprehensive as the circumstances reasonably would permit."¹¹⁸⁷ Additionally, the court noted that no complete breakdown in communication between Hudson and Mr. Wong had occurred until after the trial court made its inquiry into Hudson's reasons for wanting a different attorney.¹¹⁸⁸ Finally, the Ninth Circuit stated that while a defendant's loss of confidence in his attorney weighs heavily in the defendant's favor, it is not controlling.¹¹⁸⁹ The defendant's constitutional right to counsel must be balanced against society's interest in an efficient and prompt judicial system.¹¹⁹⁰ Accordingly, the Ninth Circuit held that Hudson's right to counsel was not violated.¹¹⁹¹ The Ninth Circuit further held that Mr. Wong effectively represented Hudson and that, therefore, Hudson's right to effective assistance of counsel was not violated.¹¹⁹²

To prevail on a claim of ineffective assistance of counsel, a defendant must not only establish that his or her attorney did not act in a reasonably competent manner, he or she must also show that the ineffective performance prejudiced his or her defense. The Ninth Circuit's use of this two-prong approach, in addition to the broad discretion accorded attorneys in their use of trial tactics, makes it extremely difficult for a defendant to establish a violation that will result in a reversal.

motion was made only one week before trial and probably would have delayed the trial; (2) the conflict between Mills and his attorney had not resulted in a complete lack of communication; and (3) the attorney presented an adequate defense. *United States v. Mills*, 597 F.2d 693, 700 (9th Cir. 1979).

1187. 686 F.2d at 831. Although not stated on the record, the Ninth Circuit inferred "that the trial court knew what the defendant's defense was, that trial counsel had consulted sufficiently with the defendant, that trial counsel was prepared, and that his advice to the defendant to testify was not aberrational." *Id.*

1188. *Id.* The Ninth Circuit distinguished *Hudson* from an earlier decision, *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970), in which a trial court's summary denial of a motion for substitution of attorney was held to be error. The court stated that in the present case, unlike *Brown*, it was not reasonable to think that the result in *Hudson* would have been different if Hudson had had confidence in his attorney. 686 F.2d at 831-32.

1189. 686 F.2d at 832.

1190. *Id.* (citing *Slappy v. Morris*, 649 F.2d 718, 721 (9th Cir. 1981), *rev'd*, 103 S. Ct. 1610 (1983)). See discussion of *Slappy*, *supra* notes 1098-1124 and accompanying text, suggesting that it may not be constitutionally necessary to balance the defendant's interest in having a different attorney against the state's interest in proceeding with the trial.

1191. 686 F.2d at 832.

1192. *Id.* The court stated that there was no basis for granting a substitution of attorney because of Mr. Wong's representation; Mr. Wong effectively represented the defendant. *Id.* The court did not state the factors it considered in determining that Mr. Wong effectively represented Hudson.

3. Right to self-representation

An individual's right to represent oneself is provided for both by statute¹¹⁹³ and by the United States Constitution.¹¹⁹⁴ However, before being permitted to proceed pro se, a defendant must make a knowing and intelligent waiver of his or her right to counsel, which necessitates a finding that the defendant is aware of the disadvantages that may be faced by electing to proceed without the benefit of counsel.¹¹⁹⁵

In *Evans v. Raines*,¹¹⁹⁶ the Ninth Circuit remanded the case to the state court for a determination of whether the defendant was competent to waive counsel and whether the waiver was made intelligently.¹¹⁹⁷ In *Evans*, the defendant was charged with rape and kidnapping for rape. On the issue of the defendant's competency to waive counsel, the Ninth Circuit noted that there was neither a hearing nor a finding on the issue in the record.¹¹⁹⁸ The Ninth Circuit agreed with the district court decision that, given substantial evidence of the defendant's inability to competently choose to waive counsel, the trial court was required, as a matter of law, to hold a hearing on the issue.¹¹⁹⁹ The Ninth Circuit also found that, absent a record showing that the defendant was advised of the penalties which could be imposed and the seriousness of the charges against him, it was impossible to say that the defendant intelligently waived his right to counsel.¹²⁰⁰ For these reasons, the case

1193. 28 U.S.C. § 1654 (1976) provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel 'as, by rules of such courts, respectively, are permitted to manage and conduct cases therein.'"

1194. *Faretta v. California*, 422 U.S. 806 (1975) (the sixth amendment guarantees a defendant a constitutional right to self-representation). Prior to the Court's decision in *Faretta*, the Supreme Court, in *Adams v. United States*, 317 U.S. 269, 279 (1942), held that a defendant is not constitutionally required to have a lawyer. Although the *Adams* Court stated in dicta that there is a right to self-representation, the right was not expressly recognized until *Faretta* was decided. The *Faretta* Court held that there is a constitutional right to self-representation. 422 U.S. at 807. This right is implicit in the sixth amendment and is supported by both the structure and the legal history of the amendment. *Id.* at 818-19.

1195. 422 U.S. at 835 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (waiver of a constitutional right is not presumed; trial judge should determine whether accused intelligently and competently waived right to counsel)).

1196. 705 F.2d 1479 (9th Cir. 1983).

1197. *Id.* at 1481.

1198. *Id.* at 1480.

1199. *Id.* The defendant had a pretrial hearing to determine his competence to stand trial, but it did not establish the higher degree of competence necessary to waive counsel. *See Westbrook v. Arizona*, 384 U.S. 150 (1966) (per curiam) (higher degree of competence required to waive counsel than is required to stand trial).

1200. 705 F.2d at 1480. A defendant must be informed of the consequence of his decision to waive counsel before the decision can be made "intelligently." *Id.* (citing *Hodge v. United States*, 414 F.2d 1040, 1042-43 (9th Cir. 1969) (en banc)).

was remanded to the district court to be sent back to the state court for a further hearing.¹²⁰¹

In *United States v. Wilson*,¹²⁰² the Ninth Circuit held that a defendant's constitutional right to represent himself does not include the right to have pretrial law library access.¹²⁰³ At Wilson's arraignment, a magistrate denied Wilson's motion to proceed pro se and appointed an attorney to represent him. Wilson then filed a notice of intent to appeal the denial, following which the magistrate held a hearing on Wilson's ability to represent himself. Based on Wilson's lack of education, the magistrate recommended that Wilson not be permitted to represent himself.¹²⁰⁴ Although Wilson objected to the recommendation, the district court failed to act on it until the day of trial.¹²⁰⁵ When asked by the court if he still wanted to represent himself, Wilson stated that he was not prepared to defend himself because he had been denied access to a law library and was unfamiliar with trial procedures. Wilson, therefore, agreed to have appointed counsel with the understanding that he could ask questions of witnesses himself and make suggestions to his appointed attorney.¹²⁰⁶

On appeal, Wilson contended that he was denied his sixth amendment right to proceed pro se.¹²⁰⁷ He claimed that although he was ultimately given the right to represent himself, the failure to notify him before trial effectively denied him the right.¹²⁰⁸ Wilson also claimed that denying him pretrial law library access violated his sixth amendment rights.¹²⁰⁹ The Ninth Circuit, interpreting *Faretta v. California*,¹²¹⁰ held that the constitutional right to represent oneself does not include the right to do research at the government's expense.¹²¹¹ The court further held that, because Wilson was not entitled to pretrial library access, the district court's failure to rule on his motion to proceed pro se until the day of trial did not violate any constitutionally pro-

1201. *Id.* at 1481. The Ninth Circuit left the method of determination to the state's discretion. *Id.*

1202. 690 F.2d 1267 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 205 (1983).

1203. *Id.* at 1273.

1204. *Id.* at 1270.

1205. *Id.*

1206. *Id.* Although he was permitted to participate in his trial, Wilson's only involvement in the trial was when he renewed his complaint about being denied law library access. *Id.*

1207. *Id.* at 1270.

1208. *Id.* at 1270-71.

1209. *Id.* at 1271. Wilson claimed that the right to self-representation recognized in *Faretta* implicitly included the "right of access to legal facilities and materials necessary to prepare legal arguments and documents." *Id.*

1210. 422 U.S. 806 (1975). *See supra* note 1206.

1211. 690 F.2d at 1271.

tected rights.¹²¹²

In *Locks v. Sumner*,¹²¹³ the Ninth Circuit held that the trial court's refusal to appoint advisory counsel to assist a pro se defendant did not violate the defendant's right to counsel.¹²¹⁴ In *Locks*, the defendant requested that he be permitted to have his appointed attorney act as co-counsel while he defended himself at trial on two counts of first-degree murder.¹²¹⁵ Following the district court's denial of his request, Locks dismissed his attorney, voluntarily waived his right to counsel, and elected to proceed pro se.¹²¹⁶ Prior to trial, Locks again requested additional counsel. The judge agreed to bring back Locks' original attorney to try the case. Locks declined, stating that although he wanted the help of the appointed attorney, he still wanted to represent himself.¹²¹⁷ The request was again denied.¹²¹⁸

On appeal, Locks argued that the trial judge's refusal to appoint advisory counsel violated his right to counsel.¹²¹⁹ In an earlier decision, the Ninth Circuit had held that a criminal defendant does not have a constitutional right to both self-representation and the assistance of co-counsel, but that the court has the discretion to permit such "hybrid representation."¹²²⁰ In *Locks*, the Ninth Circuit concluded that the right to advisory counsel¹²²¹ deserves no "higher status" than the right to co-counsel.¹²²² Consequently, the Ninth Circuit held that the trial court could, within its discretion, appoint advisory counsel for the defendant,¹²²³ but was not constitutionally required to do so.

1212. *Id.* at 1273.

1213. 703 F.2d 403 (9th Cir.), *cert. denied*, 104 S. Ct. 338 (1983).

1214. *Id.* at 407-08.

1215. *Id.* at 404.

1216. *Id.* at 405.

1217. *Id.*

1218. *Id.*

1219. *Id.* at 407. Locks also claimed a violation of his right to counsel based on his own errors. The Ninth Circuit rejected the claim. *Id.* at 408 (citing *United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975) ("A defendant representing himself cannot be heard to complain that his Sixth Amendment rights have been violated.")).

1220. *Id.* at 407 (citing *United States v. Halbert*, 640 F.2d 1000, 1009 (9th Cir. 1981); *United States v. Klee*, 494 F.2d 394, 396-97 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974)). The Ninth Circuit assumed Locks requested advisory counsel, not co-counsel. *Id.* Co-counsel permits both the defendant and his or her attorney to participate directly in the trial. Advisory counsel permits a defendant to conduct his or her own defense with the advice of an attorney; however, the attorney has no direct participation in the trial.

1221. *See infra* note 1223.

1222. 703 F.2d at 407.

1223. *Id.* at 408. The Ninth Circuit noted that the Tenth Circuit has afforded "standby" counsel similar status. *Id.* at 407 (citing *United States v. Figax*, 605 F.2d 507, 516-17 (10th Cir. 1979)). Standby counsel not only assists a pro se defendant, he or she will take over

4. Conflict of interest

An individual's constitutional right to effective assistance of counsel¹²²⁴ includes the right to representation that is free from conflict of interest.¹²²⁵ In cases where the possibility of a conflict of interest is apparent, the trial court has an affirmative duty to inquire further.¹²²⁶ To prevail on a claim of ineffective assistance of counsel based on a conflict on interest, a defendant is required to show that an actual conflict existed which adversely affected his or her attorney's performance.¹²²⁷ A defendant may make an intelligent, competent waiver of his or her right to have independent counsel.¹²²⁸

In *United States v. Powell*,¹²²⁹ the defendant and her son had dual representation by privately retained counsel. The trial judge, in open court, warned the defendant about the potential conflict of interest. Despite repeated warnings and opportunities for the defendant to retain separate counsel, she told the court she understood her rights and wanted to be represented by the same attorney as her son. The Ninth Circuit concluded that the defendant's insistence on retaining her attorney constituted a valid waiver of her right to independent counsel, and that the waiver precluded her claim of ineffective assistance of counsel.¹²³⁰ The court further stated that the defendant failed to sufficiently

completely if the defendant is unable to continue representing him or herself. *Id.* at 407 n.3. While the Supreme Court has recognized the value of permitting "hybrid representation" in helping the defendant present a defense and in maintaining the integrity of the judicial process, the Court has not held that a pro se defendant has a constitutional right to the aid of an attorney at trial. *Id.* at 407 (citing *Mayberry v. Pennsylvania*, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring); *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975)). Thus, the Ninth Circuit's decision is consistent with Supreme Court precedent.

1224. See *supra* notes 1155 & 1156 and accompanying text.

1225. *Wood v. Georgia*, 450 U.S. 261, 271 (1980) (sixth amendment right to counsel includes right to representation that is free from conflict of interest) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978)).

1226. 450 U.S. at 272 (record showed petitioner's representation by employer's counsel may have involved a conflict of interest; trial court has affirmative duty to inquire further).

1227. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) ("a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice"). Accord *Holloway v. Arkansas*, 435 U.S. 475, 484-85 (1978) (denial of attorney's request for independent counsel based on his belief that a conflict existed in his representation of multiple defendants held to satisfy requirement that actual conflict of interest be shown; no prejudice had to be shown).

1228. *Glaser v. United States*, 315 U.S. 60, 71 (1942) (trial court should determine if accused made an intelligent and competent waiver of the right to counsel) (citing *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)).

1229. 708 F.2d 455 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3540 (1984).

1230. *Id.* at 456-57. The Ninth Circuit did not cite any authority for its conclusion that the defendant made a valid waiver. However, the conclusion appears to be consistent with the requirements of FED. R. CRIM. P. 44(c). Rule 44(c) states that when two defendants, jointly

demonstrate prejudice and noted that this failure was perhaps more important in denying her claim of ineffective assistance of counsel.¹²³¹ The Ninth Circuit's consideration of prejudice in this case was contrary to prior Supreme Court and Ninth Circuit precedent.¹²³² Previous cases have held that once a defendant shows that an actual conflict of interest existed, he or she is only required to show that the conflict of interest adversely affected the attorney's conduct at trial.¹²³³

charged, are represented by the same attorney and it appears that a conflict of interest is likely to arise, the court shall take appropriate measures to protect the defendant's right to counsel. The notes of the advisory committee on rules, following Rule 44(c), indicate that a court may find and accept a valid waiver of the right to separate counsel if the defendant has been advised of the probable risks involved and the defendant has voluntarily, clearly, and unequivocally stated that he or she understands the risks and chooses to waive the right. In *Powell*, the record showed that the district judge informed the defendant of her right to separate counsel and explained the potential conflict in detail. The defendant stated that she understood her rights and wanted to be represented by the attorney. 708 F.2d at 456-57.

1231. 708 F.2d at 457 (citing *United States v. Altamirano*, 633 F.2d 147, 150-53 (9th Cir. 1980) (ineffective assistance of counsel claim based on attorney incompetency), *cert. denied*, 454 U.S. 839 (1981); *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc) (attorney errors claimed to result in ineffective assistance of counsel), *cert. denied*, 440 U.S. 974 (1979)).

1232. Claims of ineffective assistance of counsel based on conflict of interest, unlike claims based on attorney errors or omissions, do not require a showing of prejudice before relief will be granted. In *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980), the Supreme Court held that, once a defendant shows that his or her attorney actually represented conflicting interests that adversely affected his or her performance, the defendant does not need to demonstrate prejudice to obtain relief. In *United States v. Hearst*, 638 F.2d 1190, 1193-94 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981), the Ninth Circuit expressly recognized that in cases where a defendant's claim is based on a conflict of interest, the *Cuyler* rule, not the *Cooper* test, see *supra* notes 1158 & 1159 and accompanying text, applies. The court interpreted *Cuyler* to require that a defendant need show only that the conflict of interest adversely affected the attorney's performance, not that the representation resulted in prejudice.

Since *Cuyler* was decided, courts have struggled with its language. The *Cuyler* Court, although affirming its *Holloway* holding that a defendant need not demonstrate prejudice, failed to clarify how the prejudice requirement differed from requiring a defendant to show that his or her attorney's performance was adversely affected. The *Cuyler* Court also failed to clearly articulate how the courts should analyze claims based on conflict of interest. That is, should a court determine, first, that an actual conflict existed and, second, that the attorney's performance was adversely affected, or, as suggested by Justice Marshall, should a court infer that the conflict adversely affected the performance of the attorney? 446 U.S. at 358. Although the Ninth Circuit read *Cuyler* as establishing a two-pronged analysis, some courts have interpreted the decision as also requiring that prejudice be shown. Still other courts read *Cuyler* as precluding the necessity of showing anything in addition to the actual conflict. See Note, *Conflicts of Interest in the Representation of Multiple Criminal Defendants: Clarifying Cuyler v. Sullivan*, 70 GEO. L.J. 1527 (1981-82).

1233. The use of the *Cuyler* standard, as opposed to the *Cooper* test, may be particularly important in cases involving overwhelming evidence of guilt, as noted by the *Hearst* court.

For example, overwhelming evidence of guilt might (as in *Cooper* itself) make almost impossible a showing that a relatively minor error resulted in actual prejudice. But such evidence would be completely irrelevant to an inquiry whether the

C. *The Sixth Amendment Right to Present a Defense*

The sixth amendment guarantees several rights to criminal defendants that are fundamental to an adversary system of justice. The amendment provides that an accused has the right to be informed of the nature and cause of accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor.¹²³⁴ Moreover, the sixth amendment protections have been expanded under the due process clause of the fourteenth amendment to include the right of access to evidence.¹²³⁵

1. Access to evidence

Rule 16 of the Federal Rules of Criminal Procedure permits the accused to discover and inspect the government's evidence.¹²³⁶ However, the prosecution's violation of a discovery order does not reach constitutional due process dimensions unless the evidence requested by the accused is favorable to his cause and material to the issue of his guilt or punishment.¹²³⁷

In *United States v. Tamura*,¹²³⁸ the defendant was convicted, inter alia, of bribery and conspiracy for his participation in the illegal award

same error, if caused by an actual conflict of interest, showed an adverse effect on counsel's performance.

United States v. Hearst, 638 F.2d 1190, 1194 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981).

1234. The sixth amendment to the Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

1235. In *Faretta v. California*, 422 U.S. 806, 818 (1975), the United States Supreme Court stated that the rights of the criminal defendant set forth in the sixth amendment are also covered by the due process guarantee of the fourteenth amendment. In *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963), the Court held that the prosecutor's deliberate withholding of favorable evidence from the accused violates the due process clause of the fourteenth amendment.

1236. FED. R. CRIM. P. 16(a)(1) provides that upon request by the defendant the government must disclose evidence pertaining to: (1) the defendant's statements; (2) the defendant's prior record; (3) documents or other tangible objects that the government intends to use as evidence or is material to the preparation of the defense; and (4) reports of examinations and tests that the government intends to use as evidence or is material to the preparation of the defense.

1237. *Brady v. Maryland*, 373 U.S. 83 (1963), *see supra* note 1235.

1238. 694 F.2d 591 (9th Cir. 1982).

of a telephone cable contract to his employer.¹²³⁹ Prior to the trial, the district court ordered the government to issue a pretrial statement to permit defendant Tamura to prepare his defense.¹²⁴⁰ The government's statement did not disclose any evidence linking Tamura to the conspiracy's inception. Tamura, therefore, raised the defense that he was unwittingly drawn into the scheme at a later date.¹²⁴¹ One month prior to trial, the key witness recanted his prior statement and contended that Tamura had been involved in the illegal contract scheme from its inception; the prosecution, however, failed to disclose this new development until the opening remarks at trial.¹²⁴² Tamura's counsel objected, claiming unfair surprise. She moved, in the alternative, for a mistrial, a dismissal, or a continuance to prepare a rebuttal to the new evidence.¹²⁴³ The trial court denied these motions and offered either to prohibit the surprise testimony or permit it with a cautionary instruction. Tamura refused these alternatives, and the trial court permitted the testimony with a cautionary instruction.¹²⁴⁴ The Ninth Circuit upheld the trial court's denial of the continuance on the ground that the defense failed to show prejudice or to demonstrate that a continuance was necessary to prepare a rebuttal to the new evidence.¹²⁴⁵

1239. *Id.* at 594.

1240. *Id.* at 599. The order required the government to disclose before trial its theory concerning when, where, and how Tamura entered the conspiracy so that Tamura would know which witnesses to call. *Id.*

1241. *Id.*

1242. *Id.* at 598-99.

1243. *Id.* at 599.

1244. *Id.* On appeal the Ninth Circuit recognized that the surprise testimony prejudiced Tamura's opportunity to prepare his defense. *Id.* (citing *United States v. Roybal*, 566 F.2d 1109, 1110-11 (9th Cir. 1977) (prosecution's failure to disclose pursuant to discovery order that accused had sold narcotics to a government informant made it improper to offer evidence of sale at trial); *United States v. Lewis*, 511 F.2d 798, 801-03 (D.C. Cir. 1975) (prosecution's denial in response to formal request for any statements made by defendant at time of arrest prevents disclosure of such statements at trial)). However, the Ninth Circuit did not apply its holding in *Roybal* but, instead, held that the trial court's decision to give a limiting instruction rather than the relief Tamura sought was not an abuse of discretion. 694 F.2d at 599-600 (citing *United States v. Sukomolachan*, 610 F.2d 685, 688 (9th Cir. 1980) (denial of continuance was not abuse of discretion where defense could not specifically support need for continuance); *United States v. Fulton*, 549 F.2d 1325, 1328-29 (9th Cir. 1977) (refusal to order mistrial was not abuse of discretion, even though prosecution engaged in serious impropriety, since trial court offered to give a curative instruction); *United States v. Dipp*, 581 F.2d 1323, 1327 (9th Cir. 1978) (prosecutorial misconduct, failure to produce inculpatory evidence when ordered to do so, did not bar subsequent prosecution for perjury based on the evidence that was not produced), *cert. denied*, 439 U.S. 1071 (1979)).

1245. 694 F.2d at 600 (citing *United States v. Espericueta-Reyes*, 631 F.2d 616, 623 (9th Cir. 1980) (after government shows that it immediately informed defense counsel of defendant's inculpatory statement, and of its intent to offer it as proof, defense has burden to show prejudice and either request a continuance or exclusion of the testimony)).

The *Tamura* decision illustrates the Ninth Circuit's reluctance to reverse the trial court's decision to only give the accused minimal due process protection from prosecutorial indiscretions.¹²⁴⁶ Procedurally, the effect is that the accused need not be informed of new evidentiary developments as they arise. When these new developments are offered at trial, the accused has the burden to show unfair surprise which resulted in prejudice. Moreover, the relief need not be fashioned to the requests of the defense, but appears to be left to the discretion of the court.

Additionally, the Ninth Circuit in *Tamura* considered two ancillary issues. The defense had requested a one or two day recess at the close of the prosecution's case-in-chief to depose a nonresident, unindicted co-conspirator whose testimony would controvert the government's new evidence.¹²⁴⁷ The Ninth Circuit affirmed the district court's denial of the request. The court found that the request had merit, but held that in light of the strength of the evidence against Tamura, the error was harmless beyond a reasonable doubt.¹²⁴⁸

The trial court also refused to permit the defense to call the prosecutor to testify as to the sudden change in the key witness' testimony.¹²⁴⁹ The Ninth Circuit observed that such a practice is universally disfavored unless justified by a compelling need. It found no such compelling need and affirmed the trial court's decision to use a stipulation reciting the prosecutor's recollection of the facts rather than permit his testimony.¹²⁵⁰

In *United States v. Greene*,¹²⁵¹ the Ninth Circuit summarily disposed of the defendant's claim of prejudice based on the district court's

1246. See *supra* note 1244 and accompanying text.

1247. 694 F.2d at 600.

1248. *Id.* (citing FED. R. CRIM. P. 15(a); *United States v. Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978) (permitting depositions of fugitive co-defendants would not further interest of justice as required by FED. R. CRIM. P. 15(a)), *cert. denied*, 440 U.S. 947 (1979)). See also *United States v. Murray*, 492 F.2d 178, 195 (9th Cir. 1973) (to allow testimony of a fugitive to be taken by deposition would amount to an injustice), *cert. denied*, 419 U.S. 854 (1974). But see *United States v. Wilson*, 601 F.2d 95, 98 (3d Cir. 1979) (fact that person whose deposition defendants sought to take and introduce at trial was a fugitive did not provide basis for denying motion to have deposition taken).

1249. 694 F.2d at 601.

1250. *Id.* (citing *United States v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975) (no compelling need to cross-examine government counsel concerning government-prepared memorandum used to refresh government witness' memory where use of memorandum itself would have been sufficient), *cert. denied*, 424 U.S. 942 (1976); *United States v. Birdman*, 602 F.2d 547, 553 (3d Cir. 1979) (circuits unanimously disapprove of the double role of advocate-witness), *cert. denied*, 444 U.S. 1032 (1980)).

1251. 698 F.2d 1364 (9th Cir. 1983).

denial of his motion for a two-week continuance of the trial.¹²⁵² Greene argued that the government failed to provide meaningful discovery until five days before the initial trial date. The Ninth Circuit found this argument specious since the commencement of trial was subsequently delayed four weeks to permit the defense to seek an interlocutory appeal on an unrelated issue; therefore, Greene actually received much more preparation time than his counsel had requested.¹²⁵³

In *Camitsch v. Risley*,¹²⁵⁴ the accused sought to expand the right of a criminal defendant to comment on a juvenile witness' delinquency to include the right to review the otherwise confidential case files of juvenile witnesses.¹²⁵⁵ Camitsch sought to apply the rule of *Davis v. Alaska*.¹²⁵⁶ In *Davis*, the United States Supreme Court held that the confidentiality of a juvenile delinquency record must, in certain circumstances, yield to the sixth amendment right of the accused to cross-examine the juvenile witness.¹²⁵⁷

Camitsch had been prosecuted for sexual assault and nonconsensual sexual intercourse with four juvenile girls. Prior to trial he sought discovery of the entire contents of the complaining witnesses' juvenile files.¹²⁵⁸ In *Camitsch*, the Ninth Circuit held that *Davis* does not stand for the unfettered discovery of confidential juvenile records.¹²⁵⁹ The court noted that *Davis* only permits disclosure of a juvenile witness' delinquency record after a careful balancing of the respective rights of the juvenile witness and the criminally accused.¹²⁶⁰ Here, the court ruled that Camitsch failed to demonstrate that the information in the juveniles' files was so probative of bias that disclosure was warranted.¹²⁶¹ The Ninth Circuit therefore upheld the district court's decision not to allow disclosure of the files.

During the survey period, the Ninth Circuit has narrowly construed the accused's constitutional rights with respect to access to evidence which may be helpful in the preparation of a defense. The court has applied this narrow construction to both the sixth amendment right

1252. *Id.* at 1374.

1253. *Id.*

1254. 705 F.2d 351 (9th Cir. 1983).

1255. *Id.* at 352-53.

1256. 415 U.S. 308 (1974).

1257. *Id.* at 319. In *Davis*, the defendant was charged with burglary. The key prosecution witness, a juvenile, was on probation for having committed burglary, and initially had been a suspect in the crime.

1258. 705 F.2d at 352.

1259. *Id.* at 354.

1260. *Id.*

1261. *Id.*

to be informed of the nature and cause of the accusation and to the due process right to obtain favorable evidence.¹²⁶²

2. Confrontation of witnesses

The primary interest secured by the confrontation clause of the sixth amendment is the accused's right to cross-examine witnesses.¹²⁶³ Additionally, the confrontation clause requires the government to make a good faith effort to assure the availability of each prosecution witness at trial.¹²⁶⁴

In *United States v. Peltier*,¹²⁶⁵ the accused sought to establish the bias of a government witness on cross-examination. The trial court refused to permit the cross-examination on the grounds that the witness, an FBI agent, had not testified regarding any material allegations against Peltier.¹²⁶⁶

On appeal, the Ninth Circuit held that the accused's right to cross-

1262. The other circuits generally recognize the accused's right to prepare a defense through appropriate discovery. See *United States v. Bocra*, 623 F.2d 281, 285 (3d Cir. 1980) (when defense counsel makes an appropriate discovery request, the government must respond by turning over the materials), *cert. denied*, 449 U.S. 875 (1980); *United States v. Truong Dinh Hung*, 667 F.2d 1105, 1108 (4th Cir. 1981) (when production is ordered, accused has right to see and know what has been produced), *cert. denied*, 454 U.S. 114 (1982).

As in the Ninth Circuit, this right is narrowly construed. See *United States v. Kubiak*, 704 F.2d 1545, 1549 (11th Cir.) (prosecution's failure to provide co-conspirator's exculpatory statement in timely manner did not violate *Brady* since accused was not denied access to information sought, but transmittal was merely delayed), *cert. denied*, 104 S. Ct. 163 (1983); *United States ex rel. Davidson v. Wilkerson*, 618 F.2d 1215, 1219 (7th Cir.) (accused sought to review trial records prior to initiating a proceeding to vacate his sentence; he was restricted to thirty days to review records), *cert. denied*, 449 U.S. 862 (1980); *United States v. Kahl*, 583 F.2d 1351, 1354 (5th Cir. 1978) (defendant charged with tax evasion was not entitled to discovery of documents relevant to his selective prosecution defense prior to establishment of a colorable claim of selective prosecution).

Moreover, as in the Ninth Circuit, the government's failure to supply the requested documents is seldom considered reversible error. See *United States v. Sweeney*, 688 F.2d 1131, 1141 (7th Cir. 1982) (government's failure to produce allegedly exculpatory information prior to trial did not violate rule mandating disclosure of evidence favorable to accused, because Rule 16 does not require disclosure prior to trial); *United States v. Crouthers*, 669 F.2d 635, 640 (10th Cir. 1982) (where defendant expressly requested prosecutor to provide specific information and the prosecutor refused, conviction must be set aside if suppressed evidence might have affected outcome of the trial, whether it relates to issue of an accused's guilt or innocence, or credibility of the prosecutor's witness).

1263. *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

1264. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

1265. 693 F.2d 96 (9th Cir. 1982) (per curiam). The defendant was being prosecuted for escaping from federal prison and being a felon in possession of a firearm. *Id.* at 97.

1266. *Id.* The trial record revealed a lengthy and abrasive contest between opposing counsel as to the proper scope of cross-examination. The government's presentation of evidence was prolonged by such aggressive cross-examination that the trial judge abbreviated the cross-examination. *Id.*

examine a prosecution witness may be curtailed by the trial court where the prosecution's witness did not give testimony relevant to the allegations against the accused and where any potential bias of the witness was explored by counsel representing other defendants.¹²⁶⁷ The Ninth Circuit reasoned that although, as a general proposition, "a defendant is always allowed to bring out facts tending to show bias or prejudice on the part of a prosecution witness,"¹²⁶⁸ the curtailment of the cross-examination was, in this instance, not prejudicial and fully consistent with the requirements of a fair trial.¹²⁶⁹

In *United States v. Miller*,¹²⁷⁰ defendant Miller's counsel had examined the government's key witness, Szombathy, twice during the trial and had extensively questioned him regarding inconsistent statements he had made during prior proceedings. At the conclusion of the trial, Miller's counsel sought Szombathy's testimony in order to impeach him by reading his prior inconsistent statement into the record. The trial court refused this request. Miller appealed on the ground that he was denied his right to effective cross-examination.¹²⁷¹

The Ninth Circuit held that Miller had ample opportunity to challenge Szombathy's credibility during trial, and had done so; therefore, no sixth amendment violation occurred.¹²⁷² The court pointed out that the trial court has discretion to control the mode and order of interrogation and presentation of witnesses.¹²⁷³ Miller's counsel addressed Szombathy's prior inconsistent statement twice during the trial; therefore, it was determined that the additional reading of the prior inconsistent statements into the record would have been a waste of time.¹²⁷⁴

1267. *Id.* The Ninth Circuit noted that the witness had not testified as to any relevant evidence against Peltier, and that counsel for the other defendants had drawn out all the facts upon which an inference of bias against Peltier could have been drawn. *Id.*

1268. *Id.* See *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

1269. 693 F.2d at 97. But see *United States v. Willis*, 647 F.2d 54, 58 (9th Cir. 1981) (the denial of the right of cross-examination was prejudicial).

1270. 688 F.2d 652 (9th Cir. 1982). Miller had been convicted of receiving stolen goods in violation of 18 U.S.C. § 2315 (1976).

1271. 688 F.2d at 660. Miller was accused of receiving a trailer stolen from Szombathy. At trial, "Szombathy explained that during the earlier proceedings his testimony was based on trailer dimensions recorded on an inventory card, and that his trial testimony was based on measurements of the stolen trailer after its recovery." *Id.*

1272. *Id.* at 660-61.

1273. *Id.* at 660. See FED. R. EVID. 611. See also *United States v. Cutler*, 676 F.2d 1245, 1248-49 (9th Cir. 1982) (effect of trial court's ruling limiting cross-examination was simply to delay, not restrict, testing of the witness' credibility); *United States v. Bleckner*, 601 F.2d 382, 385 (9th Cir. 1979) (test of abuse of discretion by trial court is whether jury had sufficient information to appraise biases and motives of witness).

1274. 688 F.2d at 660-61 (citing FED. R. EVID. 611(a)).

The court ruled that the jury already had an adequate basis to make a discriminating appraisal of Szombathy's credibility.¹²⁷⁵

In *United States v. Tornabene*,¹²⁷⁶ the accused unsuccessfully sought to force a government informant to testify at trial. The Ninth Circuit applied the principle that the trial court has a duty to carefully hear and weigh testimony to determine whether the government made reasonable efforts to produce an informant whose presence had been properly requested by the defendant.¹²⁷⁷ Tornabene had been prosecuted for distribution of lysergic acid diethylamide (LSD); he had been arrested on the basis of one sale to government agents that had been arranged by an informant. Tornabene raised the defense of entrapment at trial.¹²⁷⁸ Prior to trial, the defense requested the name and present whereabouts of the informant. The government, in lieu of providing the requested information, agreed to produce the informant himself. However, the government failed to do so, and although continual assurances were made to the court and to the defense during subsequent hearings that the informant would be made available, the informant was never produced. Inexplicably, the trial judge found that the government had made reasonable efforts to produce the informant and ordered the trial to proceed.¹²⁷⁹

Upon review of the entire record, the Ninth Circuit found that through either neglect or intentional avoidance the government's actions were not designed to produce the informant. It thus reversed the district court's findings.¹²⁸⁰

1275. *Id.* at 661. *Cf.* *United States v. Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982) (impeaching evidence gave jury adequate basis to appraise witness biases and motives).

1276. 687 F.2d 312 (9th Cir. 1982).

1277. *Id.* at 315-16 (citing *United States v. Hart*, 546 F.2d 798, 799-801 (9th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1120 (1977)). In *Hart*, the government had used two Mexican nationals to develop its case against the defendants leading to their arrest. Although requested to do so, the informants failed to appear at trial. The government argued that it did not know of the informants' whereabouts in Mexico and, therefore, could neither ensure nor compel their attendance at trial. The Ninth Circuit held that the government need only use reasonable efforts to produce the informants and that it had met this burden. *United States v. Hart*, 546 F.2d 798, 799-801 (9th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1120 (1977).

1278. 687 F.2d at 313.

1279. *Id.* at 314-15. The basis of the trial court's finding is unclear. The Ninth Circuit's review of the record shows that the government failed to take the steps necessary to produce the witness. *See infra* note 1280 and accompanying text.

1280. *Id.* The alleged sale occurred in San Francisco; the informant resided and owned a place of business in San Antonio, Texas. Prior to trial, Drug Enforcement Administration (DEA) agents met with the informant in San Antonio, but did not advise him of the government's agreement to produce him in San Francisco. The agents merely told him that he may have to go to San Francisco. Subsequently, the informant called the DEA agents and informed them that he would be moving shortly; the agents did not obtain or request his new

In recent decisions addressing the confrontation clause of the sixth amendment, the Ninth Circuit has attempted to delicately balance the almost inviolable right of the accused to confront adverse witnesses¹²⁸¹ with the need of the criminal justice system to proceed toward resolution of cases in a forthright and timely manner.

3. Attendance of witnesses

The sixth amendment does not by its terms grant a criminal defendant the right to secure the attendance and testimony of any and all witnesses; it only guarantees compulsory process for obtaining favorable witnesses.¹²⁸² A violation of the sixth amendment may occur if the defendant is arbitrarily deprived of testimony that is relevant and material to his defense.¹²⁸³

In *United States v. Kahan & Lessin Co.*,¹²⁸⁴ two health food distributors had been convicted of price fixing and other violations of federal antitrust laws.¹²⁸⁵ The defendants contended that they had been deprived of needed testimony at trial because the government would not extend immunity to a number of their witnesses. The Ninth Circuit rejected this contention on the ground that the defendants failed to show that the testimony would have been favorable to them.¹²⁸⁶

The defendants also asserted that the government actively discouraged a number of witnesses from cooperating with the defense, thereby depriving the defendants of their testimony.¹²⁸⁷ The Ninth Circuit found that the district court had given the defendants access to at least one witness during trial, and that the defendants failed to show that they were denied access to any other witnesses. The court thus held

address. Thereafter, the agents could not locate the informant's new residence. The agents drove by the informant's business but never went inside. *Id.*

1281. See *Davis v. Alaska*, 415 U.S. 308, 315 (1974) ("The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with witnesses against him.'").

1282. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); U.S. CONST. amend. VI.

1283. *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Brady v. Maryland*, 373 U.S. 83, 87 (1963), see *supra* note 1235.

1284. 695 F.2d 1122 (9th Cir. 1982) (per curiam).

1285. *Id.* at 1123.

1286. *Id.* at 1124 (citing *United States v. Garner*, 663 F.2d 834, 839 (9th Cir. 1981) (defendant must demonstrate that favorable testimony was actually suppressed), *cert. denied*, 456 U.S. 905 (1982)). See also *United States v. Carman*, 577 F.2d 556, 561-62 (9th Cir. 1978) (before a claim of denial of due process under *Brady v. Maryland*, 373 U.S. 83 (1963) may succeed, defendant must show that favorable evidence was actually suppressed).

1287. 695 F.2d at 1124.

that the defense had not been unduly handicapped.¹²⁸⁸

4. Juvenile proceedings

In juvenile proceedings the state is considered the *parens patriae* rather than the prosecuting attorney and judge.¹²⁸⁹ The criminal justice adversary system and its attendant milieu of sixth amendment rights and privileges is replaced by a proceeding that is civil in nature wherein the only constitutional safeguard provided the child is the fundamental due process right to fair treatment.¹²⁹⁰ Implicit in the broad procedural guarantee of fair treatment is the requirement that parents of the accused juvenile be informed of their child's alleged violation of the law and be given notice of scheduled court proceedings sufficiently in advance to afford a reasonable opportunity to prepare a defense.¹²⁹¹

In *United States v. Doe*,¹²⁹² the Ninth Circuit found that the failure to immediately notify the parents of a juvenile's arrest,¹²⁹³ and the further failure to advise the parents of the child's pending hearings on his delinquency, did not infringe upon the child's due process rights because the parents were notified in a timely manner by their child's lawyer.¹²⁹⁴ The court declined to uphold the per se requirement of

1288. *Id.* (citing *United States v. Cook*, 608 F.2d 1175, 1181 (9th Cir. 1978), *cert. denied*, 444 U.S. 1034 (1980)).

1289. *In re Gault*, 387 U.S. 1, 30 (1967).

1290. *Kent v. United States*, 383 U.S. 541, 554-56 (1966) (on issue of whether juvenile court should take jurisdiction or remit the matter to trial court for adult proceedings, the juvenile is entitled to only due process rather than the full rights of adult criminal defendants). *But see* *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971) (adversarial aspects of juvenile hearings require attendant constitutional safeguards, including right to appropriate notice, to counsel, confrontation, and cross-examination, and privilege against self-incrimination).

1291. This principle, established in *In re Gault*, 387 U.S. 1 (1967), was subsequently codified by Congress as § 5033 of the Juvenile Delinquency Act at 18 U.S.C. § 5033 (1976).

In *Gault*, the authorities had failed to notify the juvenile's parents of his custodial arrest or the hearing on his delinquency. The Court reversed the boy's conviction, holding that these omissions violated the child's due process rights. 387 U.S. at 33. The *Gault* holding probably survives *McKeiver* since the issue was a procedural rather than an adversarial aspect of the juvenile justice system. *See supra* note 1290.

Section 5033 of the Juvenile Delinquency Act states in pertinent part: "Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately . . . notify the parents . . . of the rights of the juvenile and of the nature of the alleged offense." 18 U.S.C. § 5033 (1976).

1292. 701 F.2d 819 (9th Cir. 1983).

1293. *Id.* at 821-22. The failure to immediately notify the parents of a juvenile of his arrest is technically a violation of § 5033 of the Juvenile Delinquency Act. *See supra* note 1291 and accompanying text.

1294. 701 F.2d at 822. The facts are therefore distinguishable from *Gault*. *See supra* note 1291 and accompanying text.

parental notice and held that the failure of the authorities to give notice to the parents did not adversely affect the fundamental fairness of the proceedings.¹²⁹⁵

The Ninth Circuit in *Doe* has relaxed the rigid notice to parents standard and replaced it with a more flexible due process inquiry tailored to ensure that the accused receives a fair disposition of his juvenile delinquency adjudication.¹²⁹⁶

D. The Right to a Speedy Trial

1. The Speedy Trial Act

The Speedy Trial Act of 1974¹²⁹⁷ is a statutory scheme that provides both time limits within which various components of a criminal prosecution must occur and sanctions that are to be imposed for failure to comply with the time limits. The Speedy Trial Act (the Act), intended to make a speedy trial a reality, supplements a defendant's constitutional right to a speedy trial.¹²⁹⁸

a. triggering the Act

The Act states that the time period between the date of arrest and the return of an indictment or the filing of an information shall not

1295. 701 F.2d at 822-23 (citing *United States v. Watts*, 513 F.2d 5, 6-8 (10th Cir. 1975) (notice requirement is more of a prophylactic safeguard than a fundamental due process protection); *United States v. White Bear*, 668 F.2d 409, 412 (8th Cir. 1982) (notice is an additional safeguard to ensure that due process rights are not violated)).

1296. The decision in *Doe*, although contrary to the Supreme Court's holding in *Gault*, is consistent with the recent cases of other circuits, *see supra* note 1295, and is in accordance with recent developments in the Supreme Court's approach to procedural safeguards. For example, the court in *United States v. Watts*, 513 F.2d 5 (10th Cir. 1975), cited *Michigan v. Tucker*, 417 U.S. 433 (1974), in which *Miranda* warnings were held to be procedural safeguards, not constitutionally protected rights. From *Tucker*, the circuits have extracted and broadened the proposition that certain procedural safeguards, once deemed inviolable, are now only prophylactic measures designed to ensure the maintenance of basic rights, but of insufficient constitutional dimensions to require reversal if not followed. 513 F.2d at 8.

1297. 18 U.S.C. §§ 3161-3174 (1976 & Supp. V 1981). The sections of the Speedy Trial Act deal with the following areas: § 3161 (time limits and exclusions); § 3162 (sanctions); § 3163 (effective dates); § 3164 (person detained or designated as high risk); § 3165 (district plans—generally); § 3166 (district plans—contents); § 3167 (reports to Congress); § 3168 (planning process); § 3169 (Federal Judicial Center); § 3170 (speedy trial data); § 3171 (planning appropriations); § 3172 (definitions); § 3173 (sixth amendment rights); § 3174 (judicial emergency and implementation).

1298. 18 U.S.C. § 3173 (1976) provides: "No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution." The sixth amendment of the Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI.

exceed thirty days.¹²⁹⁹ Recently, the Ninth Circuit concluded that the thirty-day period is triggered only by a federal arrest of an individual who is also formally charged with an offense.¹³⁰⁰ Additionally, the court decided that the dismissal requirement applies only in situations where no indictment has been filed within the thirty-day period.¹³⁰¹

In *United States v. Candelaria*,¹³⁰² the Ninth Circuit held that the Act's mandatory dismissal of a complaint when the indictment has not been filed within thirty days after the individual is charged with an offense applies only to situations where formal charges have been filed.¹³⁰³ In *Candelaria*, the defendant was arrested by military police outside a telephone booth where he had just placed a call to the emergency 911 number and said, "There is a bomb threat at Madigan Club, okay." The defendant, not a member of the military, was released within an hour and told that subsequent action would be taken against him by the proper authorities. Forty-four days later, the defendant was indicted on one count of communicating a false bomb threat.¹³⁰⁴ Prior to his trial, the defendant moved to dismiss the indictment under the Speedy Trial Act.¹³⁰⁵ The defendant contended that the thirty-day time limit to file an indictment, as imposed by section 3161(b) of the Act, ran from the day of his arrest and, therefore, the indictment against him was filed fourteen days too late. The defendant also contended that the Act's sanction of dismissal applies to arrestees, regardless of whether charges have been filed.¹³⁰⁶ The court, noting that the

1299. 18 U.S.C. § 3161(b) (1976).

1300. *United States v. Candelaria*, 704 F.2d 1129 (9th Cir. 1983), discussed *infra* at notes 1302-07 and accompanying text; *United States v. Adams*, 694 F.2d 200 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3085 (1983), discussed *infra* at notes 1308-11 and accompanying text; *United States v. Manuel*, 706 F.2d 908 (9th Cir. 1983), discussed *infra* at notes 1312-14 and accompanying text.

1301. *United States v. McCown*, 711 F.2d 1441 (9th Cir. 1983), discussed *infra* at notes 1315-24 and accompanying text.

1302. 704 F.2d 1129 (9th Cir. 1983).

1303. *Id.* at 1131-32.

1304. *Id.* at 1130. The defendant was indicted for violating 18 U.S.C. § 844(e) (1976), which provides in pertinent part:

Whoever, through the use of the . . . telephone . . . willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, . . . to . . . unlawfully . . . damage or destroy any building . . . by means of an explosive shall be imprisoned for not more than five years or fined not more than \$5,000, or both.

1305. 704 F.2d at 1130. 18 U.S.C. § 3161(b) (1976) provides in pertinent part: "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges."

1306. 704 F.2d at 1131. 18 U.S.C. § 3162(a)(1) (1976) provides in pertinent part: "If, in the case of any individual against whom a complaint is filed charging such individual with

statute explicitly provides both the sanction and those who may invoke it, reasoned it was not the intent of Congress to extend the thirty-day protection of section 3161(b) to persons arrested but not charged with an offense.¹³⁰⁷

In *United States v. Adams*,¹³⁰⁸ the Ninth Circuit held that a state arrest does not start the thirty-day time limit for indictment provided by section 3161(b), regardless of the amount of federal involvement in the investigation and arrest.¹³⁰⁹ Three of the five defendants contended that, because their state arrest followed a joint federal and state investigation, the time period for filing the federal indictment began on the date of the state arrest.¹³¹⁰ The defendants were arrested by the state on June 12, 1980 but were not arrested and indicted by federal authorities until August 7, 1981. The Ninth Circuit held that only a federal arrest triggers the time limits of the Speedy Trial Act and, therefore, the filing of the federal indictment on the same day as the federal arrest met the time limitation of the Act.¹³¹¹

The Ninth Circuit reached a similar conclusion in *United States v.*

an offense, no indictment or information is filed within the time limit required by section 3161(b) . . . such charge against that individual contained in such complaint shall be dismissed or otherwise dropped."

1307. 704 F.2d at 1131. The Ninth Circuit generally agreed with the Eighth Circuit's reasoning in a case involving similar facts. In *United States v. Jones*, 676 F.2d 327, 329-30 (8th Cir. 1982), *cert. denied*, 459 U.S. 832 (1983), the court found from the legislative history of the Act that Congress assumed that an arrested individual would also be a "charged" individual. The Eighth Circuit also relied on the Supreme Court view that charges must be pending to trigger the Act's protection. Accordingly, where the defendant was indicted ten months after his arrest and release, the Eighth Circuit affirmed the district court's denial of a motion to dismiss under § 3162(a)(1) and concluded that § 3161(b) applied only to situations where formal charges had been filed. See *United States v. MacDonald*, 456 U.S. 1, 7 (1982) (no claim of a constitutional right to a speedy trial arises until charges are pending).

1308. 694 F.2d 200 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3085 (1983).

1309. *Id.* at 202 (citing *United States v. Iaquina*, 674 F.2d 260, 264-69 (4th Cir. 1982) (defendant's arrest by state officers, although accompanied by federal officers, did not constitute "arrest" for purposes of Speedy Trial Act); *United States v. Wilson*, 657 F.2d 755, 767 (5th Cir. 1981) (even though no state prosecution developed following defendant's state arrest for a drug-related incident which later served as basis of federal indictment, state arrest did not trigger the time limits of Speedy Trial Act), *cert. denied*, 455 U.S. 951 (1982); *United States v. Lai Ming Tanu*, 589 F.2d 82, 88 (2d Cir. 1978) (defendant's state arrest, with agreement of the federal government, did not cause the defendant to be an "accused" for purposes of Speedy Trial Act); *United States v. Mejias*, 552 F.2d 435, 441-42 (2d Cir.) (time limits of Speedy Trial Act not triggered by state arrests of defendant more than one year prior to federal indictment and arrest, notwithstanding state and federal cooperation in investigation and prosecution of incident and presence of federal agents at each of two arrests), *cert. denied*, 434 U.S. 847 (1977)).

1310. 694 F.2d at 202.

1311. *Id.* See *supra* text accompanying note 1303.

Manuel,¹³¹² a case involving an arrest by tribal authorities. The defendant was arrested and held for custodial interrogation for two days by tribal police following a brutal killing on an Indian reservation. Although federal authorities were involved with the investigation, questioned the defendant following his arrest, and decided to prosecute, a grand jury indictment against the defendant was not obtained until almost four months later.¹³¹³ The defendant contended that the delay violated the Speedy Trial Act and that the indictment against him should have been dismissed. The Ninth Circuit, affirming the district court's denial of the defendant's motion to dismiss, concluded that "only a *federal* arrest" will trigger the Act's thirty-day time period.¹³¹⁴ Absent a federal arrest, no amount of federal involvement in a state or tribal investigation and arrest will start the running of the thirty-day period.

In *United States v. McCown*,¹³¹⁵ the Ninth Circuit concluded that an indictment issued more than thirty days after the defendant's arrest did not violate his right to a speedy trial since an identical indictment had been issued within thirty days of his arrest.¹³¹⁶ The defendant was arrested on October 9, 1981 and indicted on November 3, 1981 by a federal grand jury for possession of cocaine with intent to distribute.¹³¹⁷ On December 15, 1981, the same grand jury indicted the defendant on seventeen counts. Count seventeen was identical to the single count indictment issued on November 3rd.¹³¹⁸ On December 18, 1981, the court granted the government's motion to dismiss the November indict-

1312. 706 F.2d 908 (9th Cir. 1983).

1313. *Id.* at 914.

1314. *Id.* at 915 (emphasis in the original) (citing *United States v. Adams*, 694 F.2d 200, 202 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3085 (1983); *United States v. Iaquina*, 674 F.2d 260, 264 (4th Cir. 1982); *United States v. Wilson*, 657 F.2d 755, 767 (5th Cir. 1981), *cert. denied*, 455 U.S. 951 (1982); *United States v. Leonard*, 639 F.2d 101, 104-05 (2d Cir. 1981)). In each case cited by the Ninth Circuit, the defendants argued that a non-federal arrest triggered the Speedy Trial Act time limits and, therefore, the subsequent federal indictments violated their right to a speedy trial. The courts in each case held that, regardless of the amount of federal involvement in the non-federal arrest, the Speedy Trial Act time limit was not triggered unless, and until, a federal arrest occurred.

1315. 711 F.2d 1441 (9th Cir. 1983).

1316. *Id.* at 1448.

1317. *Id.* at 1445. Defendant's conviction was based on a violation of 21 U.S.C. § 841(a)(1) (1976) which provides in pertinent part: "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally — (1) to . . . distribute . . . or possess with intent to . . . distribute . . . a controlled substance."

1318. 711 F.2d at 1445. The same facts formed the basis of both counts. The only difference between the November 3rd indictment and count 17 of the December indictment was the use of the defendant's full middle name in one and his middle initial in the other. *Id.* at 1445 n.2.

ment based on the duplication. The defendant then moved to dismiss count seventeen of the December indictment on the ground that it had not been issued within the thirty-day period prescribed in section 3161(b).¹³¹⁹ The Ninth Circuit held that section 3161(b) did not support dismissal, based on the express language of the statute¹³²⁰ and the purposes for requiring a speedy indictment.¹³²¹ The Ninth Circuit reasoned that because of the identical single count indictment issued on November 3rd, this was not a case where "*no indictment*"¹³²² had been filed; nor was the defendant hampered in any way in preparing his defense. If the government had moved to dismiss the later indictment, instead of the November 3rd indictment, the defendant would have no speedy trial violation claim.¹³²³ The court also noted that the December 15th indictment did not create an impermissible delay in the defendant's trial because the time limit ran from the defendant's November 10th arraignment, not from the date the indictment was issued.¹³²⁴

1319. *Id.* at 1445. See *supra* note 1305 for the statutory language. The defendant argued that § 3161(d)(1) required the original thirty-day time limit to apply to any subsequent indictments filed against him. The pertinent language of 18 U.S.C. § 3161(d)(1) (Supp. V 1981) provides: "If any indictment or information is dismissed upon motion of the defendant" The Ninth Circuit concluded that, based on the statutory language, the section did not apply because it concerns only dismissal upon a motion of the defendant, not dismissals in cases such as this where the dismissal is based on a motion by the government. 711 F.2d at 1446. The court also reasoned that § 3161(h)(6), applicable to dismissal upon the government's motion, did not apply because it contemplates a situation where the first indictment is dismissed before a subsequent indictment is issued. *Id.* The pertinent language of 18 U.S.C. § 3161(h)(6) (1976) provides: "If the . . . indictment is dismissed upon motion of . . . the Government and thereafter a charge is filed against the defendant for the same offense"

1320. 711 F.2d at 1447. The court stated: "Section 3161(b) cannot properly be construed independently of § 3162(a)(1) and the purposes of the Speedy Trial Act." *Id.* (citing *United States v. Candelaria*, 704 F.2d 1129, 1131 (9th Cir. 1983)). The court relied on the language in § 3162(a)(1) which requires dismissal if "*no indictment*" is filed within the time limit. 711 F.2d at 1447 (emphasis added by the Ninth Circuit). The purpose of the Speedy Trial Act is to help reduce crime and the danger of recidivism. To achieve this purpose, the Act requires speedy trials and increases the supervision over persons released pending trial. H.R. REP. NO. 1508, 93rd Cong., 2d Sess. 8, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7401, 7402.

1321. Speedy indictment serves two purposes: (1) it notifies the defendant of the charges against which he or she must defend him or herself; and (2) it gives the defendant a clear statement of the allegations against him or her so the defendant can raise them as a bar against subsequent prosecution. Only the first purpose applies before trial. 711 F.2d at 1447.

1322. *Id.* (emphasis added by the court).

1323. *Id.* at 1448.

1324. *Id.* 18 U.S.C. § 3161(c)(1) (Supp. V 1981) provides in pertinent part:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence

In *United States v. Wilson*,¹³²⁵ the Ninth Circuit held that the recapture and return to custody of an escapee does not trigger the thirty-day limit within which an indictment must be filed charging the person with escape.¹³²⁶ The government contended, and the Ninth Circuit agreed, that the statutory time limit is triggered only by an arrest or service of summons in connection with an indictment.¹³²⁷ Wilson was not arrested in connection with his indictment for escape¹³²⁸ and, therefore, the thirty-day time requirement did not apply.¹³²⁹

b. pretrial preparation

In 1979, section 3161(c)(2)¹³³⁰ was added to the Speedy Trial Act. This subsection expressly provides that, absent written consent of the defendant or an election to proceed pro se, there must be a minimum of thirty days between the time defendant first appears through counsel and commencement of the trial.

In *United States v. Daly*,¹³³¹ the Ninth Circuit held that providing a defendant with less than thirty days for pretrial preparation is inadequate and constitutes a violation of the Speedy Trial Act.¹³³² The court

within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

1325. 690 F.2d 1267 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 205 (1983).

1326. *Id.* at 1276. The defendant, Wilson, was sentenced to six months in a federal half-way house for a misdemeanor to which he pled guilty. About two weeks into the sentence, Wilson signed out and failed to return. Wilson was recaptured and returned to custody two months before an indictment was filed against him charging him with escape. *Id.* at 1270.

1327. 18 U.S.C. § 3161(b) (1976) states in pertinent part: "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges."

1328. Wilson was arrested and returned to custody two months prior to the filing of an indictment for escape. 690 F.2d at 1270. The court said that Wilson's arrest was not "in connection with" his escape, but that he was merely being returned to custody to complete his previous sentence. *Id.* at 1276. See *supra* note 1327.

1329. 690 F.2d at 1276. Accord *United States v. Kripplebauer*, 463 F. Supp. 291, 292 (E.D. Pa. 1978) ("Speedy trial times are triggered, however, by arrest (or indictment) for the crime in question, not detention for some other offense."); *United States v. Grant*, 433 F. Supp. 1113, 1115 (S.D.N.Y. 1977) (no speedy trial violation by an indictment on an escape charge four months after return to custody).

1330. Section 3161(c)(2) provides: "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." 18 U.S.C. § 3161(c)(2) (Supp. V 1981).

1331. 716 F.2d 1499 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1456 (1984).

1332. *Id.* at 1504. See *supra* note 1330. In *Daly*, none of the defendants consented in writing to the trial date nor did any of the defendants waive their right to counsel and elect to proceed pro se. 716 F.2d at 1504 n.2.

also held that the thirty-day minimum time period begins to run when an attorney appears on the defendant's behalf, unless the attorney is appearing for a limited purpose only and will not represent the defendant at trial.¹³³³

In *Daly*, four defendants, Criswell, Daly, Klemp and Diaz, claimed the district court erred by setting their trial date for September 15th in violation of section 3161(c)(2) of the Act.¹³³⁴ On August 14th, Criswell, Daly and Klemp each appeared with counsel before a magistrate for a determination of their bail status. Klemp's attorney was appointed explicitly to represent him at the hearing while counsel for Daly and Criswell subsequently represented them at trial. Criswell, Daly and Diaz were arraigned on August 17th. Klemp's trial counsel was also appointed on August 17th and appeared to seek a delay of Klemp's arraignment. Klemp was arraigned on August 20th.¹³³⁵

The Ninth Circuit found a clear violation of Diaz's right to the thirty-day preparation period. His initial appearance was at his arraignment on August 17th and he, therefore, could not be tried before September 16th without violating section 3161(c)(2).¹³³⁶ In contrast, because Daly and Criswell each appeared at their August 14th bail determination hearing with counsel who continued to represent them at trial, the court determined that the September 15th trial date was timely.¹³³⁷ Klemp, however, was not appointed trial counsel until August 17th, at which time the attorney appeared on Klemp's behalf to seek a delay of his arraignment. The court held that this August 17th appearance triggered the thirty-day period.¹³³⁸ Therefore, September

1333. *Id.* at 1505. Appearances made by an attorney on the defendant's behalf will not begin the thirty-day pretrial preparation period if either (1) the attorney has been appointed to represent the defendant for a limited pre-arraignment purpose or (2) the attorney states his intention not to represent the defendant further. *Id.*

1334. *Id.* at 1503. See *supra* note 1330.

1335. 716 F.2d at 1503-04. See *supra* note 1333. The district court had concluded that in a multi-defendant case the statutory thirty-day period began to run from the first appearance of any of the defendants. However, the Ninth Circuit noted that the language of § 3161(c)(2), see *supra* note 1330, indicates that each defendant must be considered individually. The court stated that the language of the Act does not support the district court's position which, in effect, would make each defendant's statutory right dependent on the government's decision to join the cases and on the time of arrest of the co-defendants. 716 F.2d at 1504.

1336. The Ninth Circuit followed the procedure set out in FED. R. CRIM. P. 45(e) to compute the various time periods. The rule provides in pertinent part: "In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included." 716 F.2d at 1504 n.3.

1337. 716 F.2d at 1505.

1338. *Id.* at 1504-05.

16th was the earliest trial date that should have been set. Accordingly, the Ninth Circuit ruled that the September 15th trial date violated Klemp's right to the section 3161(c)(2) preparation period.¹³³⁹

Because the Act offers no specific guidance as to the appropriate remedy for a violation,¹³⁴⁰ the Ninth Circuit fashioned its decision from the purpose of section 3161(c)(2). The court determined that because section 3161(c)(2) was enacted to afford the defendant reasonable time to obtain counsel and to grant counsel reasonable time to prepare the defendant's case,¹³⁴¹ the violation denied Diaz and Klemp a fair trial.¹³⁴² The court characterized the procedural error as tantamount to an erroneously denied motion for a continuance. Accordingly, the Ninth Circuit reversed the convictions of both Diaz and Klemp and remanded for a new trial.¹³⁴³

c. arrest-to-indictment delay

The Act also provides a sanction for failure to comply with the thirty-day period within which an indictment must be returned following an arrest. The charges in the complaint must be dismissed or dropped.¹³⁴⁴

In *United States v. Antonio*,¹³⁴⁵ the Ninth Circuit held that section 3162(a)(1)¹³⁴⁶ requires dismissal of a complaint against a defendant when an indictment is not issued within the thirty-day limit required by

1339. *Id.* at 1505.

1340. *Id.* at 1506. The Ninth Circuit declined to determine whether the sanction provided in § 3162(a)(2), requiring dismissal of an indictment, applied because § 3162 expressly provides that a motion for dismissal may be ordered only on a motion of the defendant. Although the defendants had sought a continuance, neither defendant had made a motion to dismiss at the trial. *Id.*

1341. *Id.* at 1504-05 (citing Judicial Conference of the U.S., Comm. on the Admin. of the Crim., *Guidelines to the Administration of the Speedy Trial Act of 1974, as amended*, 11-12 (1981)).

1342. *Id.* at 1506.

1343. *Id.*

1344. 18 U.S.C. § 3162(a)(1) (1976) provides in part:

If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the [thirty day] time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.

18 U.S.C. § 3161(h) (1976 & Supp. V 1981) provides a comprehensive list of reasons for delay which will cause the delay period to be excluded from the computation of time within which the trial must commence. Section 3161(h)(1) expressly states that only a period of delay resulting from other proceedings concerning the defendant is excludable. 18 U.S.C. § 3161(h)(1) (Supp. V 1981).

1345. 705 F.2d 1483 (9th Cir. 1983).

1346. *See supra* note 1306.

section 3161(b).¹³⁴⁷ In *Antonio*, a criminal complaint was filed on June 22, 1981 charging the defendant with involuntary manslaughter.¹³⁴⁸ On June 23, 1981 he was arrested and appeared before a United States magistrate. Thirty-five days later the defendant filed a motion to dismiss the criminal complaint against him. He contended that because an indictment had not been returned within thirty days after his arrest, the court was required under section 3162(a)(1) to dismiss the complaint against him, either with or without prejudice.¹³⁴⁹ Several hours after the defendant filed his motion to dismiss, he was indicted by the grand jury. The defendant's motion subsequently was heard and denied. Thereafter, a superseding indictment was filed. The defendant filed a second motion to dismiss the complaint, which was also denied. The defendant was tried and convicted of involuntary manslaughter.¹³⁵⁰ The government contended, and the district court agreed, that because an indictment had been returned before the defendant's motion was heard, dismissal of the complaint would not "nullify" the indictment. The district court found that even if the charge was dismissed, it could be refiled. The district court thus concluded that dismissal of the complaint would be a nullity.¹³⁵¹

The Ninth Circuit held that section 3162(a)(1), when read in conjunction with section 3161(b), requires dismissal of a complaint, even if an indictment may be pending, whenever a motion to dismiss is filed before trial and when neither an indictment nor an information has been filed against the defendant within thirty days after his arrest.¹³⁵²

1347. 705 F.2d at 1485. See *supra* note 1305.

1348. Defendant was charged with violating 18 U.S.C. §§ 1112 and 1153. 18 U.S.C. § 1112 (1976) provides in pertinent part: "(a) Manslaughter is the unlawful killing of a human being without malice. . . . Involuntary — In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1153 (1976) provides in pertinent part: "Any Indian who commits against the person . . . of another Indian or other person any of the following offenses, . . . manslaughter . . . within the Indian country, shall be subject to the same laws and penalties as all other persons"

1349. 705 F.2d at 1484. 18 U.S.C. § 3162(a)(1) (1976) provides in pertinent part:

In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

1350. 705 F.2d at 1484.

1351. *Id.* at 1485.

1352. *Id.* at 1486. Although not expressly stated, implicit in the court's holding is that the motion to dismiss is filed by the defendant. Section 3162(a)(2) (1976) states that if the defendant is not brought to trial within the required time limit the information or indictment "shall be dismissed on motion of the defendant." The legislative history of § 3162 expressly recognizes that while the dismissal is mandatory it is not automatic since the defendant is

The court further stated that although the dismissal is mandatory, it is within the trial court's discretion whether the dismissal is with or without prejudice.¹³⁵³ Accordingly, the Ninth Circuit vacated the judgment and sentence of the district court and remanded the case for a determination by the district court of whether the dismissal should have been with or without prejudice.¹³⁵⁴

In *United States v. Mehrmanesh*,¹³⁵⁵ the Ninth Circuit held that the Act's sanction for an arrest-to-indictment delay does not apply to cases in which the defendant was arrested prior to July 1, 1980.¹³⁵⁶ In *Mehrmanesh*, the defendant was arrested on March 20, 1980 and indicted on July 9, 1980, a total of 111 days after his arrest. Mehrmanesh filed a motion to dismiss the indictment, alleging that 64 of the 111 days were nonexcludable¹³⁵⁷ and that, therefore, a violation of the Act occurred which required dismissal of the indictment.¹³⁵⁸ The district court denied the motion to dismiss.

The government did not dispute that a violation of the Act occurred.¹³⁵⁹ Therefore, the government's only claim was that the sanctions did not apply because Mehrmanesh was arrested before July 1, 1980, the effective date of the statute.¹³⁶⁰ The Ninth Circuit, noting that neither the statutory language of section 3163(c)¹³⁶¹ nor the legislative history provided an express answer as to whether Congress intended the sanction to apply,¹³⁶² concluded that the construction advanced by the government was the only one that gave meaning to all the statutory language and was consistent with the Act's structure and purpose.¹³⁶³ The court held, therefore, that sanctions for an arrest-to-

required to move for dismissal and the government is free to contest the motion. See H.R. REP. NO. 1508, 93rd Cong., 2nd Sess. 38, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7401, 7431.

1353. 705 F.2d at 1486. See *supra* note 1349.

1354. 705 F.2d at 1487.

1355. 689 F.2d 822 (9th Cir. 1982).

1356. *Id.* at 829.

1357. *Id.* at 827 n.2.

1358. *Id.* at 827.

1359. *Id.*

1360. *Id.*

1361. 18 U.S.C. § 3163(c) (Supp. V 1981) provides that the sanctions for a violation of the Act "shall become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980."

1362. 689 F.2d at 828.

1363. *Id.* at 829. Mehrmanesh argued that the dismissal sanction applied to his case because the indictment occurred after July 1, 1980. The Ninth Circuit rejected the construction because it would render the phrase "all cases commenced by arrest or summons" mere surplusage." *Id.* (citing *United States v. Marubeni America Corp.*, 611 F.2d 763, 767 (9th

indictment delay apply only in cases where the arrest occurs on or after July 1, 1980 and that sanctions for an indictment-to-trial delay apply only to cases where the indictment is filed on or after July 1, 1980.¹³⁶⁴ The Ninth Circuit affirmed the district court's denial of Mehrmanesh's motion to dismiss, stating that because he was arrested before July 1, 1980, the dismissal sanction did not apply.¹³⁶⁵

d. indictment-to-trial delay

In any case in which a defendant pleads not guilty, the time period within which the trial must begin is established by section 3161(c)¹³⁶⁶ of the Act. The section provides that the trial must begin within seventy days from either the date on which the indictment is filed or the date on which the defendant appears before a judicial officer of the court in which the charge is pending. The seventy-day period runs from the later of the two dates.¹³⁶⁷

In *United States v. Haiges*,¹³⁶⁸ the Ninth Circuit held that where a defendant is indicted prior to his arraignment, the day of the defendant's arraignment is excludable in computing the time within which the defendant must be brought to trial.¹³⁶⁹ In *Haiges*, the defendant was arrested on November 6, 1981. He appeared before a magistrate on the day of his arrest and was held to answer the charges against him. He was indicted on November 10th, and on November 18th, he pled not guilty at his arraignment. His trial was set for January 19, 1982. On January 14, 1982 the clerk filed a minute order which vacated the Janu-

Cir. 1980) (government's interpretation of RICO would have rendered part of statutory language redundant; therefore, construction was untenable)).

1364. *Id.* The court's statutory construction is recommended by the Judicial Conference of the United States. Although not binding, the Ninth Circuit considered the Judicial Conference's recommendation persuasive. *Id.* at 829 n.7. The Ninth Circuit also discussed and rejected a third possible interpretation of the statute. Senator Biden interpreted the sanctions in the original language of § 3163(c) (1976) to apply to late indictments when the arrest occurred before the effective date but only if the indictment was filed more than thirty days after the July 1, 1979 effective date. *Id.* at 829 n.6. Section 3163(c) was amended on August 2, 1979 making July 1, 1980 the effective date.

1365. 689 F.2d at 830.

1366. 18 U.S.C. § 3161(c) (Supp. V 1981).

1367. 18 U.S.C. § 3161(c)(1) (Supp. V 1981) provides in part:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date . . . of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

1368. 688 F.2d 1273 (9th Cir. 1982).

1369. *Id.* at 1275.

ary 19th trial date and reset the trial for January 20th,¹³⁷⁰ seventy-one days from the filing date of the indictment.

At trial, the defendant moved to dismiss the indictment against him, contending that the government failed to bring him to trial within seventy days after the filing of the indictment as required by the Speedy Trial Act.¹³⁷¹ The trial court denied the motion, holding as a matter of law that the day of arraignment constituted an excludable delay under section 3161(h)(1).¹³⁷²

Under the District Court of Arizona's plan for implementation of the Speedy Trial Act,¹³⁷³ the district court automatically excludes the day of arraignment in computing the time between indictment and trial when the defendant has made an initial appearance before his indictment. In approving the practice, the district court concluded that "arraignment was a 'proceeding concerning the defendant,' and therefore excludable under section 3161(h)(1)."¹³⁷⁴ The defendant contended that because arraignment triggers the Act's time limits it cannot also be a "proceeding" that tolls the time limit.¹³⁷⁵

The Ninth Circuit affirmed the district court holding, noting that the list provided in section 3161(h)(1) of "proceedings concerning the defendant" which are excludable is not exhaustive.¹³⁷⁶ Additionally, the Ninth Circuit relied on the United States Judicial Conference

1370. *Id.* at 1274.

1371. *See supra* note 1367.

1372. 688 F.2d at 1274. 18 U.S.C. § 3161(h) (1976 & Supp. V 1981) provides in pertinent part:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant

. . . .

(8)(A) Any period of delay resulting from a continuance granted by a judge on his own motion . . . , if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

The trial court also held that January 19th, the day Haiges' trial was continued, was excludable under 18 U.S.C. § 3161(h)(8)(A). The Ninth Circuit did not reach the issue since, by holding the day of Haiges' arraignment excludable, the defendant's trial began within the prescribed time period.

1373. Sections 3165 and 3166 of the Speedy Trial Act require each district court to prepare a plan of disposition of criminal cases in accordance with the provisions of the Act. 18 U.S.C. § 3166(b)(2) (1976) provides "[e]ach plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including: the incidence of, and reasons for, periods of delay under section 3161(h) of this title."

1374. 688 F.2d at 1274. *See supra* note 1372.

1375. 688 F.2d at 1274.

1376. *Id.* at 1275.

Guideline's conclusion that arraignment proceedings are excludable. The court also found this interpretation to be consistent with the statute's legislative history.¹³⁷⁷

In *United States v. Jones*,¹³⁷⁸ the Ninth Circuit held that the continuance granted by the district court did not violate the defendant's right to a speedy trial.¹³⁷⁹ On appeal, the defendant contended that the government sought to continue his trial from December 7, 1981 until March 22, 1982 for the purpose of getting a superseding indictment.¹³⁸⁰ The court found, however, that the record clearly showed that the continuance was necessary to permit continuity of counsel for a co-defendant.¹³⁸¹ The Ninth Circuit also agreed with the district court's conclusion that the continuance was warranted due to the complexity of the case.¹³⁸² Because both reasons for the continuance are contemplated by the Speedy Trial Act¹³⁸³ and account for time that is excluded when computing the time within which a trial must commence, the Ninth Circuit held that the Act had not been violated.¹³⁸⁴

1377. *Id.* See Judicial Conference of the U.S., Comm. on the Admin. of the Crim. Law, *Guidelines to the Administration of the Speedy Trial Act of 1974, as amended*, at 44 (1981). See also H.R. REP. NO. 1508, 93rd Cong., 2d Sess. 7, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7401, 7414 (House Report indicates Congress' intent to permit tolling of time limits of Speedy Trial Act by hearing, proceedings and other necessary delays which normally occur prior to a criminal trial).

1378. 712 F.2d 1316 (9th Cir.), *cert. denied*, 104 S. Ct. 434 (1983).

1379. *Id.* at 1322-23.

1380. *Id.* at 1323.

1381. *Id.* 18 U.S.C. § 3161(h) governs periods of delay which are excludable in computing the time within which a trial must commence. Section 3161(h)(8)(B)(iv) specifically provides that a trial judge may grant a continuance, the time of which is excludable, if a denial would "unreasonably deny the defendant . . . continuity of counsel."

1382. 712 F.2d at 1323. 18 U.S.C. § 3161(h)(8)(B)(ii) provides that a judge may grant a continuance, the delay of which is excludable under the Speedy Trial Act, if the judge finds, and states in the record, that "the case is . . . so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation . . . for the trial itself within the time limits established by [the Speedy Trial Act]." In *Jones*, the defendant and two co-defendants were charged with misappropriation of funds and conspiracy. Additionally, the defendant and one co-defendant were charged with mail fraud and securities fraud. 712 F.2d at 1320. The Ninth Circuit stated that the decision not to sever the cases and try the defendant separately was not an abuse of the court's discretion given the complexity of the case and the overlapping proof involved in the different counts. *Id.* at 1323 (citing *United States v. Nolan*, 700 F.2d 479, 483 (9th Cir.), *cert. denied*, 103 S. Ct. 3095 (1983)).

1383. See *supra* notes 1381 & 1382.

1384. 712 F.2d at 1323. The court also held that, given the complexity of the case and the overlapping proof on different counts, it was not an abuse of discretion for the district court to decide not to sever the case and try the defendant separately. *Id.*

2. The Juvenile Justice and Delinquency Prevention Act

The Juvenile Justice and Delinquency Prevention Act of 1974¹³⁸⁵ (the Juvenile Justice Act) is a comprehensive statutory scheme enacted to provide a coordinated approach to the problems of juvenile delinquency and to improve the quality of juvenile justice.¹³⁸⁶ Section 5503 of the Juvenile Justice Act establishes procedural steps that must be followed whenever a juvenile is taken into custody for an alleged act of juvenile delinquency.¹³⁸⁷ The section requires that the juvenile be taken "forthwith" before a magistrate and provides that he or she may never be detained for an unreasonable period prior to a court appearance.¹³⁸⁸

In *United States v. Doe*,¹³⁸⁹ the Ninth Circuit held that, given the particular facts of the case, the one and a half day time period between the juvenile's arrest and arraignment was reasonable and did not constitute a violation of the Juvenile Justice Act.¹³⁹⁰ In *Doe*, the defendant was arrested on the night of April 28, 1983 for transporting illegal aliens from Mexico to the United States. The following day he was moved from the first detention center to another and then, that afternoon, he was taken to a metropolitan correctional center. An information was filed against him at his arraignment before a magistrate on the morning of April 30th.¹³⁹¹

On appeal, the defendant argued that he was detained for an unreasonably long time before his arraignment.¹³⁹² The district court

1385. 18 U.S.C. §§ 5031-5042 (1976 & Supp. V 1981). These sections of the Juvenile Justice and Delinquency Act of 1974 deal with the following: § 5032 (delinquency proceedings in district court, transfer for criminal prosecution); § 5033 (custody prior to appearance before a magistrate); § 5034 (duties of magistrate); § 5035 (detention prior to disposition); § 5036 (speedy trial); § 5037 (disposition hearing); § 5038 (use of juvenile records); § 5039 (commitment); § 5040 (support); § 5041 (parole); § 5042 (revocation of parole or probation).

1386. See H.R. REP. NO. 1011, 93rd Cong., 2d Sess. 2, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 5283, 5283.

1387. 18 U.S.C. § 5033 (1976) provides that, once a juvenile is taken into custody, the "juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate."

1388. See *supra* note 1387.

1389. 701 F.2d 819 (9th Cir. 1983).

1390. *Id.* at 824.

1391. *Id.* at 821.

1392. *Id.* at 821-22. See *supra* note 1387. The Ninth Circuit distinguished two Second Circuit cases where the juvenile was afforded relief for shorter periods of delay than that involved in *Doe*. Each of the cited cases was decided based on a predecessor statute which provided that a juvenile could not be detained for longer than "necessary." More currently, however, in *United States v. Smith*, 574 F.2d 707, 710 (2d Cir.), cert. denied, 439 U.S. 986 (1978), the court held that a six hour delay between the arrest of a juvenile and his appear-

found that the delay was not unreasonable under the circumstances and, thus, did not constitute a violation of the Juvenile Justice Act. The agents were extremely busy the day the defendant was taken into custody and had to give priority to more urgent cases.¹³⁹³ The government made a good faith effort to arraign the defendant as soon as possible; however, no magistrate was available until April 30, 1983.¹³⁹⁴

The Ninth Circuit affirmed the district court's finding but limited its holding to the particular facts and circumstances of the case. The court's willingness to say that Doe appeared "forthwith" before a magistrate was premised on two facts. First, the government made a good faith effort to arraign Doe as soon as possible, and, second, the government did not use Doe's pre-arraignment statement at the juvenile adjudication hearing.¹³⁹⁵

E. The Right to a Jury Trial

1. Gravity of the offense

The sixth amendment right to a jury trial applies only to "serious" offenses and not "petty" offenses.¹³⁹⁶ As a basis for deciding the gravity of an offense, the Supreme Court has generally looked to the maximum penalty authorized, rather than the penalty actually imposed.¹³⁹⁷ Offenses carrying a maximum penalty not exceeding six months, a \$500 fine, or both are usually considered "petty."¹³⁹⁸ However, in criminal contempt cases¹³⁹⁹ and collateral consequence cases,¹⁴⁰⁰ the use of the

ance before a magistrate was reasonable under the circumstances and, thus, did not constitute a violation of 18 U.S.C. § 5033 (1976).

1393. Cases given priority included a woman in the late stages of pregnancy and women with small children and infants. 701 F.2d at 824.

1394. *Id.*

1395. *Id.*

1396. *See* Frank v. United States, 395 U.S. 147, 148-49 (1969); Bloom v. Illinois, 391 U.S. 194 (1968); District of Columbia v. Clawans, 300 U.S. 617 (1937); Callan v. Wilson, 127 U.S. 540 (1888).

1397. *See* Baldwin v. New York, 399 U.S. 66, 68, 70 (1970) (plurality opinion) (most relevant standard is the maximum penalty possible); Duncan v. Louisiana, 391 U.S. 145, 161-62 (1968) (defendant entitled to jury trial where crime held a maximum two year punishment).

1398. Duncan v. Louisiana, 391 U.S. 145, 161 (1968).

1399. *See* Frank v. United States, 395 U.S. 147, 148 (1969) (petitioner was charged with criminal contempt for violating an injunction); Muniz v. Hoffman, 422 U.S. 454, 476-77 (1975) (petitioner guilty of criminal contempt for violating temporary injunction against picketing); Codispoti v. Pennsylvania, 418 U.S. 506, 516-17 (1974) (defendant sentenced by state to seven contempt terms of six months aggregated to three years and three months considered serious). Congress has not specified the penalty in contempt cases so the court looks to the fine or imprisonment actually imposed.

1400. *See* United States v. Craner, 652 F.2d 23, 25-27 (9th Cir. 1981) (possibility that de-

maximum penalty as a criterion of the gravity of the offense is not dispositive.¹⁴⁰¹ For example, in *United States v. Craner*,¹⁴⁰² the defendant was convicted of driving under the influence of alcohol in Yosemite National Park, which carries a maximum penalty of six months imprisonment, a \$500 fine, or both.¹⁴⁰³ The possibility that Craner could have had his driving license revoked by the State of California, if he was convicted, acted as a collateral consequence which reclassified the offense as "serious."¹⁴⁰⁴ Therefore, the court held that Craner was entitled to a trial by jury.¹⁴⁰⁵

In *United States v. Arbo*,¹⁴⁰⁶ the defendant was convicted of interfering with forest officials in the performance of their official duties.¹⁴⁰⁷ Arbo's motion for a jury trial had been denied by the district court.¹⁴⁰⁸ On appeal, Arbo did not argue collateral consequences or that the maximum penalty of 16 U.S.C. section 551¹⁴⁰⁹ was not a considered legislative judgment,¹⁴¹⁰ but rather that his offense was *malum in se*. In an older line of cases, inquiry into whether the offense was *malum in se* or *malum prohibitum*¹⁴¹¹ was a frequently used criterion for deciding the seriousness of an offense.¹⁴¹² Arbo contended that because he could

fendant could lose his driver's license where maximum penalty was within "petty" classification, made crime "serious" and entitled defendant to a jury trial).

1401. *Id.*

1402. 652 F.2d 23 (9th Cir. 1981).

1403. 36 C.F.R. § 1.3 (1983). The maximum penalty in *Craner* of six months, or \$500, or both was set by the Secretary of the Interior and not by Congress. Since those rules were not promulgated by Congress, and therefore did not represent considered legislative judgment, the court felt justified in diminishing the import of the maximum penalty rule. The court underscored the lack of considered judgment by pointing out that driving under the influence carries the same penalty as digging for bait in a national park. 652 F.2d at 25.

1404. 652 F.2d at 28 (Sneed, J., concurring).

1405. *Id.* at 27.

1406. 691 F.2d 862 (9th Cir. 1982).

1407. *Id.* Arbo violated 36 C.F.R. § 261.3(a) (1983) and 16 U.S.C. § 551 (1976). 36 C.F.R. § 261.3(a) (1983) prohibits: "[t]hreatening, resisting, intimidating, or interfering with any forest officer engaged in . . . the performance of his official duties in the protection, improvement, or administration of the National Forest System." The penalty for a violation is not to exceed six months imprisonment, a \$500 fine, or both. 16 U.S.C. § 551 (1976).

Arbo had a mining claim in the Shasta-Trinity National Forest. Two rangers with the United States Forest Service visited Arbo to determine whether Arbo was complying with certain mining regulations. Arbo refused to allow the rangers to make an inspection and ushered them off his property at gunpoint.

1408. 691 F.2d at 863.

1409. See *supra* note 1407.

1410. See *supra* note 1403.

1411. *Malum in se* refers to an offense that is evil or wrong in itself while *malum prohibitum* refers to an offense prohibited by statute but which is not inherently wrong or evil.

1412. See *District of Columbia v. Clawans*, 300 U.S. 617, 625 (1937) (gravity of crime should be considered with the moral quality of the act to determine classification of the

have been charged with forcible interference with federal officers under 18 U.S.C. section 111,¹⁴¹³ which is a felony under federal law, the interference for which he was charged under 16 U.S.C. section 551 should be considered *malum in se*.¹⁴¹⁴ The court disagreed, citing the regulatory nature of section 551¹⁴¹⁵ and characterized the statute as *malum prohibitum*.¹⁴¹⁶ The distinction between 18 U.S.C. section 111 and 16 U.S.C. section 551 is that section 111 includes the additional element of force, which makes it a felony and therefore *malum in se*.¹⁴¹⁷ The court held that even though Arbo could have been charged under 18 U.S.C. section 111, it did not alter the regulatory nature of the offense for which he was charged.¹⁴¹⁸ Thus, Arbo's offense was considered "petty" and he was not granted a right to trial by jury.¹⁴¹⁹

In *United States v. Jenkins*,¹⁴²⁰ the Ninth Circuit considered whether the imposition of a two-year probation term altered the seriousness of a charge and thus entitled the defendant to a jury trial.¹⁴²¹ Jenkins was a civilian visiting a Marine military base. He was detained while seeking a guest pass, and an argument ensued. The argument escalated into a scuffle when a military policeman attempted to restrain Jenkins. The defendant tried to hit the policeman with his elbow, and the force of the blow carried both of them through a plate glass window. Jenkins was originally charged with assault by striking, beating, or wounding in violation of 18 U.S.C. section 113(d).¹⁴²² Jenkins re-

offense); *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930) (driving recklessly is *malum in se*). In a recent case, the moral quality distinction in *Colts* and *Clawans* was not repudiated. *United States v. Sanchez-Meza*, 547 F.2d 461, 464 (9th Cir. 1976). *Colts* was cited without disapproval in *Baldwin v. New York*, 399 U.S. 66, 69 n.6 (1970), the case which supposedly erased the moral character of the offense as determinative of whether a defendant had a right to a jury trial.

1413. 18 U.S.C. § 111 (1976) provides in pertinent part: "[w]hoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person . . . while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than three years, or both."

1414. 691 F.2d at 864.

1415. The purpose of 16 U.S.C. § 551 (1976) is to regulate the use and occupancy of public forests and prevent their destruction. The section authorizes the promulgation of rules reasonably designed to effectuate that purpose. See *United States v. Weiss*, 642 F.2d 296, 298 (9th Cir. 1981) (Secretary may adopt regulations which do not impermissibly impair mining claims).

1416. 691 F.2d at 864.

1417. See *United States v. Cunningham*, 509 F.2d 961, 963 (D.C. Cir. 1975) (defendant resisted federal officers who tried to make him participate in line-up).

1418. 691 F.2d at 864.

1419. *Id.* at 865.

1420. 734 F.2d 1322 (9th Cir. 1983).

1421. *Id.* at 1326-27.

1422. 18 U.S.C. § 113(d) (1976) provides: "Assault by striking, beating, or wounding, [is

quested a jury trial and his request was granted. Subsequently, the government filed a superseding information which reduced the charge to a simple assault under 18 U.S.C. section 113(e).¹⁴²³ The superseding assault charge carried a maximum imprisonment of three months, or a fine of \$300, or both.¹⁴²⁴ Jenkins' request for a jury trial was denied. He was convicted and given a suspended ninety-day sentence and placed on two years probation.¹⁴²⁵

The Ninth Circuit decided that the seriousness of the offense was not altered by the two-year probation term.¹⁴²⁶ The court relied on *Frank v. United States*,¹⁴²⁷ which held that a three-year probation term did not entitle the defendant to a jury trial.¹⁴²⁸ The Ninth Circuit found *Frank* to be controlling and denied Jenkins' appeal.¹⁴²⁹

2. Not guilty by reason of insanity pleas

In *Pennywell v. Rushen*,¹⁴³⁰ defendant Pennywell argued that his sixth amendment right to a jury trial was violated by the failure of a California state court to dispose of his plea of not guilty by reason of insanity.¹⁴³¹ Pennywell was convicted in California Superior Court of murder and attempted murder.¹⁴³² He appeared pro se at the arraignment and pleaded not guilty and not guilty by reason of temporary insanity. The court attempted to apprise Pennywell that, under California law, a plea of temporary insanity is not recognized and is, in fact, nugatory. Although he continued to hold to this plea, the court pled Pennywell not guilty and not guilty by reason of insanity (NGI) on its own motion.

At subsequent proceedings, the court referred to Pennywell's plea as a not guilty plea only.¹⁴³³ Neither Pennywell nor the counsel ap-

punishable] by fine of not more than \$500 or imprisonment for not more than six months, or both."

1423. 734 F.2d at 1324.

1424. 18 U.S.C. § 113(e) (1976) provides: "Simple assault, [is punishable] by fine of not more than \$300 or imprisonment for not more than three months, or both."

1425. 734 F.2d at 1324.

1426. *Id.* at 1326-27.

1427. 395 U.S. 147 (1969).

1428. *Id.* at 150.

1429. 734 F.2d at 1327.

1430. 705 F.2d 355 (9th Cir. 1983).

1431. *Id.* at 357.

1432. Pennywell's conviction was appealed and denied. He then exhausted his state remedies and filed for a federal writ of habeas corpus which was also denied. He appealed to the Ninth Circuit. *Id.*

1433. *Id.* After the arraignment, a suppression hearing was held before a new judge. The record is unclear as to whether the second judge was aware of the NGI plea. From the

pointed for him made an objection to this characterization of Pennywell's plea. They introduced no evidence at trial on the NGI plea and did not object to the court disposing of the NGI plea at any time prior to appeal to the Ninth Circuit.¹⁴³⁴

Pennywell's argument was that California did not adhere to its own methods of dealing with NGI pleas.¹⁴³⁵ The Ninth Circuit interpreted his claim not as a sixth amendment claim, but rather as a due process claim.¹⁴³⁶ The court stated that it was necessary for Pennywell to show that his trial was rendered "so 'arbitrarily and fundamentally unfair' " by California's alleged error of failure to follow its own procedures that due process was violated.¹⁴³⁷ The court held that there was no error and that, even if there was error, Pennywell failed to make the requisite showing that the error rendered his trial "arbitrary" or "fundamentally unfair."¹⁴³⁸

The court found that there was no error because a plea in California must be entered personally by a defendant.¹⁴³⁹ If that defendant does not cooperate, the trial court's only option is to enter a plea of not guilty.¹⁴⁴⁰ If the trial court pleads NGI on its own initiative, that plea is invalid.¹⁴⁴¹ Pennywell contended that he should be entitled to rely on the NGI plea whether validly entered or not,¹⁴⁴² and cited *People v.*

suppression hearing to voir dire, the selection of a jury, and sentencing, the court characterized the plea as not guilty.

1434. *Id.*

1435. *Id.* California mandates separate jury trials for issues of guilt and sanity. A defendant entering a plea of not guilty by reason of insanity along with another plea or pleas is tried first as to the other pleas and then as to his sanity. During the initial determination, the defendant is presumed to have been sane. *See* CAL. PENAL CODE § 1026 (West Supp. 1984). The defendant's sanity must be determined prior to sentencing once a valid NGI plea has been entered. *People v. Lyons*, 18 Cal. App. 3d 760, 96 Cal. Rptr. 76 (1971).

1436. 705 F.2d at 357. In a footnote, the Ninth Circuit justified its interpretation by stating that federal law does not mandate that the jury consider an NGI plea in every case where such a plea is entered. The defendant has the responsibility of introducing evidence which indicates he was not legally capable as to the committed acts. *Id.* at 357 n.1 (citing *United States v. Henderson*, 680 F.2d 659, 661-62 (9th Cir. 1982)). Pennywell did not place his sanity in issue by introducing evidence of his lack of capability. *Id.* at 357.

1437. *Id.* (citing *Powell v. Spalding*, 679 F.2d 163, 166 (9th Cir. 1982)). Relief is only available when violation of state law makes the trial arbitrary and fundamentally unfair. In *Powell*, there was no showing that the judge allowing the jury to separate overnight met that standard. *Powell v. Spalding*, 679 F.2d 163 (9th Cir. 1982).

1438. 705 F.2d at 357.

1439. *Id.* (citing CAL. PENAL CODE § 1018 (West 1970)).

1440. *Id.* (citing CAL. PENAL CODE § 1024 (West Supp. 1984)).

1441. *Id.* *See People v. Vanley*, 41 Cal. App. 3d 846, 854-55, 116 Cal. Rptr. 446, 451-52 (1974) (defendant never manifested his assent to his own counsel's plea).

1442. 705 F.2d at 357.

*Blye*¹⁴⁴³ for support. *Blye* involved an escapee of a mental institution who openly admitted his guilt on the counts charged.¹⁴⁴⁴ After conferring with counsel, the trial court entered an NGI plea for *Blye*, and in that case the entered plea was upheld.¹⁴⁴⁵ The *Pennywell* court distinguished *Blye* by stating that whereas *Blye* was not capable of entering and understanding an NGI plea, *Pennywell* appeared at his arraignment pro se and demonstrated an understanding of the law.¹⁴⁴⁶ Even after the arraigning judge explained California's non-recognition of the temporary insanity plea, *Pennywell* refused to plead NGI.¹⁴⁴⁷

The court then held that, even if it was error under California law not to try *Pennywell* on his NGI plea, due process was not violated because the facts underlying an NGI claim were brought out at trial.¹⁴⁴⁸ *Pennywell* alleged that an injection of heroin and cocaine made him temporarily insane.¹⁴⁴⁹ The trial court gave consideration to that allegation and recognized that *Pennywell* had a diminished capacity defense. He was allowed to support that defense by introducing evidence, and his requested diminished capacity instruction was delivered by the trial judge.¹⁴⁵⁰ Therefore, the court found that the trial was not "arbitrary or fundamentally unfair" because the jury was exposed to, and rejected, the allegations on which an NGI plea would have been based.¹⁴⁵¹

F. The Right to a Public Trial

The first amendment provides the public a right of access to criminal trials.¹⁴⁵² This right of access encompasses pretrial proceedings such as suppression hearings.¹⁴⁵³ In recent times, this right of access has clashed with a defendant's sixth amendment right to a fair trial by

1443. 233 Cal. App. 2d 143, 43 Cal. Rptr. 231 (1965).

1444. *Id.* at 145, 43 Cal. Rptr. at 233. *Blye* was charged with the burglary of three watches from a pawnshop. Three other counts of burglary, including one for stealing five cookies from a bakery, were dropped prior to trial.

1445. *Id.*

1446. 705 F.2d at 357.

1447. *Id.*

1448. *Id.* at 358.

1449. *Id.*

1450. *Id.*

1451. *Id.*

1452. U.S. CONST. amend. I. See *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion) (although no provision of the Constitution expressly guarantees the public or press a right of access to criminal trials, the Court recognized that historically the public has had access to criminal trials).

1453. *United States v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982).

an impartial judge or jury.¹⁴⁵⁴

The Ninth Circuit, in *Associated Press v. District Court*,¹⁴⁵⁵ extended the right of access in a criminal trial to documents filed in connection with pretrial proceedings. As a prologue to its decision, the court reviewed the events which gave rise to the suit.

In October 1982, John DeLorean and two co-defendants were indicted in a Los Angeles federal district court on charges of violating federal narcotics statutes.¹⁴⁵⁶ Hordes of newspaper, magazine, and television people attended the proceedings and created tremendous public interest in the case. This was partially, if not wholly, attributed to Mr. DeLorean's celebrity status and the strange circumstances of the case.¹⁴⁵⁷ The district judge responded to the extensive media coverage by closing the records and files in the case to the public and press on December 22, 1982.¹⁴⁵⁸ The closure order was issued sua sponte without notice to the parties, the press, or the public and unaccompanied by any findings, specific or otherwise.¹⁴⁵⁹ None of the interested groups were consulted or given an opportunity to be heard.¹⁴⁶⁰ Pursuant to a press request to vacate or stay the December 22nd order, the district judge held a hearing on January 25, 1983, at which time the parties and the press expressed their views.¹⁴⁶¹ On March 22, 1983, the request was denied in an opinion which carefully analyzed the competing interests in the case.¹⁴⁶² Although all of the documents filed in the case were

1454. U.S. CONST. amend. VI. See, e.g., *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (criminal trial closed in order to protect defendant's fair-trial right); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (public's right of access did not overcome defendants' rights on appeal).

1455. 705 F.2d 1143 (9th Cir. 1983).

1456. *Id.* at 1144.

1457. *Id.* John DeLorean is a former executive of General Motors, Pontiac and Chevrolet divisions, who was responsible in large part for two vastly successful automobiles, the GTO and the Firebird. He is also an engineer who holds more than 100 patents and whose credits include concealed windshield wipers, radio antennae, stacked headlights, and "wide track" styling. After leaving General Motors, DeLorean started his own automobile manufacturing company, the DeLorean Motor Company (DMC). He raised nearly \$240 million, and built and staffed a factory in Northern Ireland in less than two and one-half years. DMC eventually failed. DeLorean was subsequently arrested for trafficking in cocaine, allegedly in an effort to keep DMC afloat.

1458. *Id.* The order provided that all future filings of documents were to be *in camera* and filed under seal. The district court would then review the documents and make a determination as to their disclosure based on first amendment rights of access and sixth amendment fair-trial rights as set forth in *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982).

1459. 705 F.2d at 1144.

1460. *Id.*

1461. *Id.* at 1145.

1462. *Id.*

still to be automatically sealed, the procedure for handling the documents was modified.¹⁴⁶³ The Associated Press and other news-gathering agencies were not mollified and proceeded to file for a writ of mandamus to vacate the closure orders of December 22nd and March 22nd.¹⁴⁶⁴

In *Associated Press*, the Ninth Circuit saw no reason to distinguish between pretrial proceedings and pretrial documents.¹⁴⁶⁵ The court reasoned that historically the press and public have had a common law right of access to pretrial documents, with few exceptions,¹⁴⁶⁶ and that pretrial documents are frequently important to the full understanding of judicial processes and government functioning.¹⁴⁶⁷ Therefore the public and press were found to have a first amendment right to pretrial documents in general.¹⁴⁶⁸

The Ninth Circuit noted that the first amendment right of access might at times conflict with a defendant's sixth amendment right to a fair and impartial trial.¹⁴⁶⁹ The court then placed the burden on the party seeking closure to establish a strict necessity for sealing the documents.¹⁴⁷⁰ In order to discharge this burden, the Ninth Circuit relied on a three-part test enunciated in *Gannett Co. v. DePasquale*¹⁴⁷¹ and adopted in *United States v. Brooklier*.¹⁴⁷² First, there must exist a substantial probability that a party's fair-trial right will be irreparably damaged if pretrial documents are not sealed; second, there must be a

1463. *Id.* When the court received a document, the clerk would notify the City News Service of the filing by the title of the document. The parties would then have forty-eight hours to submit written comments as to the necessity for closure. After the forty-eight hour response period, the court would then rule on whether or not to unseal the document. The closure order did not prohibit the court from ordering that a document be unsealed prior to the expiration of the forty-eight hour period if the court determined that sealing of the document was unnecessary. The order allowed the parties the right to comment, but in practice the district court extended this right to the press, too. *Id.*

1464. *Id.*

1465. *Id.* In erasing any distinction between pretrial proceedings and documents filed in regard to them, the Ninth Circuit relied on two principal justifications underlying the public's first amendment right of access: (1) criminal trials have historically "been open to the press and general public;" and (2) "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Id.* (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982)).

1466. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978) (right of public to know not as important as need to safeguard defendants' rights on appeal).

1467. 705 F.2d at 1145 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)).

1468. *Id.*

1469. *Id.*

1470. *Id.*

1471. 443 U.S. 368, 440-42 (1979).

1472. 685 F.2d 1162 (9th Cir. 1982).

substantial probability that alternatives to sealing the documents would not adequately protect a party's fair-trial right; and, third, there must be a substantial probability that closure would effectively prevent the threatened harm. All three prongs must be met for the burden to be discharged.¹⁴⁷³

The court disposed of the issue of irreparable damage to DeLorean by alluding to Abscam and Watergate. The court emphasized that very few potential jurors had more than " cursory knowledge" of Abscam,¹⁴⁷⁴ despite extensive publicity. Watergate was cited for the related proposition that extensive publicity did not prevent the selection of an impartial jury.¹⁴⁷⁵

As to the second requirement of inadequate alternatives to closure, the court interpreted *Brooklier* to mean that "no less drastic alternative [is] available."¹⁴⁷⁶ The court asserted that trial judges have the ability and means to persuade parties to act responsibly in filing documents that might prejudice the right to a fair trial.¹⁴⁷⁷ The court was also satisfied that careful jury selection is an adequate alternative, especially in a population center as large as Los Angeles.¹⁴⁷⁸

Given the vast amount of publicity generated even after the trial judge's orders, the court expressed grave doubt that the closure orders would have any significant protective effect on DeLorean's fair-trial rights.¹⁴⁷⁹ Besides the finding that none of the three substantive prongs of the test were met,¹⁴⁸⁰ the court reasoned that the "presumption of openness" that underscores criminal proceedings was being violated even by the limited forty-eight hour period the documents might be kept under seal.¹⁴⁸¹ The court held that the record of the case revealed no necessity for blanket closure and directed the district court's orders

1473. *Id.* at 1167. The court in *Brooklier* counseled adherence to this test which was promulgated by Justice Blackmun and supported by three other Justices in *Gannett*, but the Supreme Court has not resolved the issues of the proper allocation of the burden or the standard for determining whether a criminal proceeding may be closed. *Id.*

1474. 705 F.2d at 1146 (citing *United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980) (court granted television networks permission to copy FBI videotape in order to broadcast it while trial was in progress and juries in other indictments were not yet selected)).

1475. *Id.*

1476. *Id.*

1477. *Id.*

1478. *Id.*

1479. *Id.* The court noted that there was "currently no shortage of information for the press to exploit." *Id.*

1480. *Id.* at 1147. In a footnote, the court stated that the parties agreed that the trial judge had instituted the closure order after prosecutorial allegations had linked DeLorean to the Irish Republican Army. *Id.* at 1146 n.2.

1481. *Id.* at 1147.

to be vacated on the ground that the public's first amendment right of access had been violated.¹⁴⁸²

Rather than demand that the sealed documents be immediately released as is customary under an unconstitutional order, the court recognized that the parties may have filed documents in reliance upon those orders.¹⁴⁸³ The parties were therefore given three days in which to make a motion to seal documents filed under the orders on an item-by-item basis.¹⁴⁸⁴ The district court was directed to apply the procedural and substantive requirements of *Brooklier* in ruling on any motion.¹⁴⁸⁵ Any document that the district judge determined should remain sealed was to be accompanied by findings of a sufficiently specific nature so as to facilitate appellate review.¹⁴⁸⁶

Judge Poole, in his concurrence, agreed that the court was bound to follow *Brooklier*'s procedural and substantive requirements until the Supreme Court decides the issue.¹⁴⁸⁷ He disagreed, however, with the majority's implication that adverse pretrial publicity carries minimal consequences.¹⁴⁸⁸ The judge chided the majority's conclusion that bias could unfailingly be kept out of such a trial by the large pool of potential jurors in urban centers, the probing questions asked of those jurors on voir dire, and limiting instructions to consider only evidence introduced at trial.¹⁴⁸⁹ Judge Poole professed such a view to be unrealistic.¹⁴⁹⁰ He suggested that the trial judge, as an alternative to closing or sealing the documents, consider a partial excising of inflammatory material.¹⁴⁹¹ The judge pointed out that a careful reading of relevant cases indicates that the fair-trial right "is companion, not servant, to the constitutional guarantee of public trial."¹⁴⁹²

1482. *Id.*

1483. *Id.*

1484. *Id.*

1485. *Id.*

1486. *Id.*

1487. *Id.* at 1147-48 (Poole, J., specially concurring).

1488. *Id.* at 1148 (Poole, J., specially concurring).

1489. *Id.* (Poole, J., specially concurring). Judge Poole took issue with the majority's quotation from *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1967), which formed the basis of the court's conclusion that bias would not result, and branded the quotation as misleading. He also classified the conclusion as dictum. 705 F.2d at 1148 (Poole, J., specially concurring).

1490. *Id.* (Poole, J., specially concurring). Judge Poole stated that "[there] is no doubt in the real world that pervasive adverse publicity can indeed contaminate the air for fair trial. No one can now say what persistent effect, if any, lurid publicity will have on the trial, even after months have passed." *Id.* (Poole, J., specially concurring).

1491. *Id.* at 1149 (Poole, J., specially concurring).

1492. *Id.* (Poole, J., specially concurring).

III. PRETRIAL PROCEEDINGS

A. *Grand Jury Proceedings*

1. Dismissal for prosecutorial misconduct

The grand jury "has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused."¹⁴⁹³ The grand jury's purpose is to determine whether there is probable cause to believe that a crime has been committed and to shield the defendant from groundless prosecution.¹⁴⁹⁴

The prosecutor is the only official present during grand jury hearings, and under these circumstances he or she logically controls the direction of the proceedings.¹⁴⁹⁵ The grand jury usually relies on the prosecutor to determine which witnesses to call.¹⁴⁹⁶ The prosecutor examines the witnesses and determines which evidence to present to the grand jury.¹⁴⁹⁷ Additionally, the prosecutor usually prepares the indictment.¹⁴⁹⁸

The Ninth Circuit has expressed reluctance to dismiss grand jury indictments on grounds of prosecutorial misconduct.¹⁴⁹⁹ Such a dismissal may be based on the fifth amendment due process clause,¹⁵⁰⁰ or on the court's inherent supervisory powers.¹⁵⁰¹ In either case, the integrity of the judicial system must be upheld. However, a court's review

1493. *Wood v. Georgia*, 370 U.S. 375, 390 (1962). For a discussion of the history and importance of the grand jury, see *United States v. Calandra*, 414 U.S. 338, 342-46 (1974); *Costello v. United States*, 350 U.S. 359, 361-62 (1956); *Blair v. United States*, 250 U.S. 273, 279-83 (1919); *Hale v. Henkel*, 201 U.S. 43, 59 (1906).

1494. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

1495. "It is the prosecutor who will explain and construe the myriad of laws that the Grand Jury is charged to enforce. Moreover, this representative of the executive branch of the government will also instruct the jury as to the quantum of proof necessary to justify an indictment." Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 177 (1973).

1496. *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

1497. *Id.*

1498. *Id.*

1499. See, e.g., *United States v. Al Mudarris*, 695 F.2d 1182 (9th Cir.), *cert. denied*, 103 S. Ct. 2097 (1983), *infra* notes 1507-44; *United States v. Chanen*, 549 F.2d 1306, 1310 (9th Cir.) (grand jury indictment would not be overturned unless prosecutorial misconduct created intrusion into defendant's constitutional rights), *cert. denied*, 434 U.S. 825 (1977). For a review of some of the many cases in other circuits where motions to dismiss for prosecutorial misconduct were denied, see *Chanen*, 549 F.2d at 1310-11.

1500. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974); *United States v. Estepa*, 471 F.2d 1132, 1135-37 (2d Cir. 1972).

1501. *United States v. Chanen*, 549 F.2d 1306, 1309 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

of grand jury proceedings is by definition restricted by the constitutionally based independence of grand juries and prosecutors.¹⁵⁰²

In reviewing appeals based on claims of prosecutorial misconduct, the court considers whether there was prosecutorial error, preservation of the issue for appeal, and prejudice to the defendant.¹⁵⁰³ The defendant must show that the prosecutor's conduct significantly interfered with the grand jury's ability to carry out its independent judgment.¹⁵⁰⁴ The Ninth Circuit will reverse only if it finds that it was more probable than not that the misconduct affected the verdict.¹⁵⁰⁵ The court will dismiss a grand jury indictment if necessary to preserve the integrity of the judicial process, and if there is gross misconduct resulting in a dismissal that has a clear basis in law and fact.¹⁵⁰⁶

A recent Ninth Circuit case illustrates the court's unwillingness to depart from precedent. In *United States v. Al Mudarris*,¹⁵⁰⁷ the court held that: (1) the use of a summary witness before the grand jury was proper; (2) the prosecutor's improper comments on arson allegedly committed by the defendants' brother were not prejudicial in view of evidence against the defendants; and (3) the prosecutor's usurpation of the grand jurors' obligations did not necessitate reversal.¹⁵⁰⁸ The court recognized the broad discretion that prosecutors need in order to execute their law enforcement function. Yet the court noted that "[a] line must be drawn beyond which prosecutor's control over a cooperative

1502. *United States v. Cederquist*, 641 F.2d 1347, 1352 (9th Cir. 1981).

1503. See, e.g., *United States v. Giese*, 597 F.2d 1170, 1198-1200 (9th Cir.), cert. denied, 444 U.S. 979 (1979).

1504. *United States v. Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981) (fact that prosecutor conveys his impression to grand jury that indictment is warranted does not require dismissal). The Ninth Circuit has held that "[d]ismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way." *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978).

1505. *United States v. Valle-Valdez*, 554 F.2d 911, 915-16 (9th Cir. 1977) (reversal is necessary when it is more probable than not that the error materially affected the verdict).

1506. *United States v. Rasheed*, 663 F.2d 843, 853 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982) (citing *United States v. Samango*, 607 F.2d 877, 880-81 & n.6 (9th Cir. 1979)). See also *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.) (Attorney General has prosecutorial discretion unless the conduct is "arbitrary, capricious, and violative of due process"), cert. denied, 439 U.S. 842 (1978). A defendant who claims prosecutorial misconduct in grand jury proceedings carries a heavy burden of proof. In *United States v. Owen*, 580 F.2d 365 (9th Cir. 1978), the court followed the rule of the Fifth, Seventh, and Eighth Circuits that the accused must suffer actual prejudice from the misconduct before a dismissal is required. *Id.* at 367-68. The federal court's supervisory powers to dismiss an indictment "remain a harsh, ultimate sanction [which] are more often referred to than invoked." *United States v. Baskes*, 433 F. Supp. 799, 806 (N.D. Ill. 1977).

1507. 695 F.2d 1182 (9th Cir.), cert. denied, 103 S. Ct. 2097 (1983).

1508. *Id.* at 1185-89.

grand jury may not extend.' »¹⁵⁰⁹

The defendants in *Al Mudarris* were indicted and subsequently convicted of mail fraud for filing false insurance claims for burn treatment.¹⁵¹⁰ The defendants appealed their convictions, contending that prosecutorial misconduct required dismissal of their indictments.¹⁵¹¹ The grand jury, in one afternoon, had heard only a summary witness and returned the indictments. That morning, the same grand jury had heard summary testimony by the same witness on an indictment concerning arson and conspiracy charges sought against the defendants' brother and others. The morning indictment did not charge the defendants. However, the prosecutors believed that the defendants were setting fires for their brother and the other alleged arson conspirators when one of the defendants sustained the burns which resulted in the medical insurance fraud.¹⁵¹²

The defendants argued that the government presented its case improperly, thus preventing the grand jury from evaluating the witnesses' credibility.¹⁵¹³ The court dismissed the defendants' objection that the government used only the summary hearsay testimony of a witness and the transcribed testimony of some previous witnesses. The court noted that an indictment may be based solely on hearsay.¹⁵¹⁴ The Ninth Cir-

1509. *Id.* at 1188 (quoting *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979) (prosecutor intentionally submitted transcript which was very prejudicial to defendant, resulting in indictment that was deemed serious threat to judicial integrity)).

1510. *Id.* at 1184. The defendants were brothers. Only one of them had medical insurance. He signed insurance claims for his brother's burn treatment as if he himself had received it. The claims were processed by mail. The government sought mail fraud indictments against the brothers and a treating doctor who knew them before the injury. *Id.*

1511. *Id.*

1512. *Id.*

1513. The defendants contended that the government: (1) used only the summary hearsay testimony of a Bureau of Alcohol, Tobacco and Firearms agent; (2) failed to call available witnesses who had testified before prior grand juries; and (3) gave the grand jury the transcribed testimony of some earlier witnesses. *Id.* at 1185.

1514. *Id.* (citing *Costello v. United States*, 350 U.S. 359, 363-64 (1956) (indictment based solely on hearsay evidence does not violate fifth amendment)).

The grand jury's sources of information are varied, and the validity of an indictment is not influenced by the character of the evidence considered. *United States v. Calandra*, 414 U.S. 338, 344-45 (1974). Grand juries can properly indict suspects on the basis of evidence obtained in violation of the fourth amendment. *United States v. Zieleszinski*, No. 83-1130, slip op. at 3589, 3591 (9th Cir. Aug. 13, 1984). The grand jury may compel the production of evidence or the testimony of witnesses as it deems proper, and certain evidentiary rules do not apply during grand jury proceedings. *Calandra*, 414 U.S. at 343. See *United States v. Romero*, 585 F.2d 391, 399 (9th Cir. 1978) (grand jury may base indictment solely on hearsay), *cert. denied*, 440 U.S. 935 (1979). In *Romero*, the court held that the grand jury indictment could not be invalidated on grounds that the prosecutor presented no exculpatory evidence, especially since the evidence sought to be presented did not clearly negate guilt.

cuit rejected the Second Circuit rule which allows dismissal of an indictment based solely on hearsay testimony when better evidence is available.¹⁵¹⁵

Id. at 399. See also *United States v. Long*, 706 F.2d 1044, 1050 (9th Cir. 1983) (use of hearsay evidence at prior grand jury proceeding did not warrant dismissal of indictment in second grand jury proceeding); *United States v. Raftery*, 534 F.2d 854, 857 (9th Cir.) (drug manufacturing equipment, which was inadmissible at state trial, could be used in perjury trial of defendant who had falsely testified before grand jury), *cert. denied*, 429 U.S. 862 (1976).

As early as 1958, the Supreme Court held that a grand jury indictment may be based on evidence obtained in violation of a defendant's fifth amendment privilege against self-incrimination. *Lawn v. United States*, 355 U.S. 339, 348-50 (1958). In *United States v. Scheufler*, 599 F.2d 893, 896 (9th Cir.), *cert. denied*, 444 U.S. 933 (1979), the Ninth Circuit denied a defendant's claim that his fifth amendment rights were violated when a grand jury witness commented on his failure to testify. The court held that the comments did not taint an otherwise valid indictment. *Id.* The grand jury's broad power to hear evidence also has resulted in the ruling that a witness may not refuse to answer questions on the ground that they are based on evidence derived from an illegal search and seizure. *Calandra*, 414 U.S. at 353-55.

The grand jury is not restricted by the same technical procedural rules imposed on trial courts. *Id.* "It is a grand inquest, . . . the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 282 (1919). Thus when a grand jury considers an indictment, the defendant has no right to confront and cross-examine witnesses. No absolute right to counsel attaches at this stage. *United States v. Mandujano*, 425 U.S. 564, 581 (1976); *Gollaher v. United States*, 419 F.2d 520, 523 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969). A witness has no right of privacy before a grand jury. *Calandra*, 414 U.S. at 353. *Miranda* warnings need not be given to a defendant interrogated before a grand jury. *Mandujano*, 425 U.S. at 580 (rationale of *Miranda* in protecting accused from custodial interrogation by police did not apply to judicial setting of grand jury); *United States v. Kelly*, 540 F.2d 990, 992-93 (9th Cir. 1976) (target witnesses need not receive *Miranda* warnings), *cert. denied*, 429 U.S. 1040 (1977).

1515. 695 F.2d at 1185 (citing *United States v. Samango*, 607 F.2d 877, 880 n.6 (9th Cir. 1979) (use of hearsay testimony did not invalidate grand jury indictment even if direct testimony was available)). The determinative factor is whether the grand jury has been deceived into believing that it was hearing direct testimony, not hearsay. *United States v. Chanen*, 549 F.2d 1306, 1311 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

The Ninth Circuit has held that when a grand jury returns an indictment valid on its face, the district judge is foreclosed from inquiring into the sufficiency of the evidence before the jury. *United States v. Fried*, 576 F.2d 787, 792 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978). The United States Supreme Court, in *Costello v. United States*, 350 U.S. 359, 363 (1956) similarly noted:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

The court also held that the use of a single summary witness before the grand jury did not invalidate the indictment.¹⁵¹⁶ The prosecutor was not obligated to present to the grand jury all issues concerning credibility of witnesses or exculpatory evidence.¹⁵¹⁷ The court reasoned that most of the absent witnesses were hospital and insurance personnel and handwriting experts. The co-defendant was the only witness whose credibility was at stake, and the appellants said that he would have been an exculpatory witness.¹⁵¹⁸

The court also rejected the defendants' contention that the government submitted only partial testimony to the grand jury. The court reasoned that this summary procedure was proper under the liberal standards of the Ninth Circuit.¹⁵¹⁹ The unsubmitted transcripts concerned cumulative and irrelevant testimony. The court stated that the omission was permissible, but suggested that it is generally preferable to submit the transcripts of all former testimony that is summarized.¹⁵²⁰

The defendants also argued that the prosecutor and the summary witness improperly referred to an arson indictment of the defendants' brother.¹⁵²¹ The government representatives persistently asserted that one of the defendants sustained the burn injuries while setting an arson fire and that the defendants were part of an arson conspiracy.¹⁵²² The government referred twice to news stories about arson-related deaths.

The court noted that the government had a coherent and convincing case for mail fraud without connecting this indictment to arson. The information served only to prejudice the grand jury against the defendants.¹⁵²³ In criticizing the government's conduct, the court observed that a prosecutor may not make prejudicial remarks to sway the grand jury, thus denying an accused's right to have his or her indictment tested by the grand jury's independent judgment.¹⁵²⁴

1516. 695 F.2d at 1185.

1517. *Id.* (citing *United States v. Tham*, 665 F.2d 855, 862-63 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982)). The Ninth Circuit has ruled that no independent inquiry may be made into the type of evidence presented, when a duly constituted grand jury returns a valid indictment. *Id.* at 863 (citing *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974)). A grand jury need not be informed of all issues affecting credibility. Dismissal of the indictment is only necessary in extreme cases, as when the prosecutor knowingly presents perjured testimony. *Id.* (citing *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978)).

1518. 695 F.2d at 1186.

1519. *Id.*

1520. *Id.*

1521. *Id.*

1522. *Id.*

1523. *Id.* The court noted that the first reference to news stories was "blameless," and that the second reference was "more inept than calculated." *Id.*

1524. *Id.* (citing *United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979) (prosecutor

The court restricted its criticism, however, and held that in order to reverse an indictment, "substantial" grand jury bias must be proven.¹⁵²⁵ The error in referring to arson activities was not deemed prejudicial, given the credible and relevant evidence which tended to establish the defendants' guilt.¹⁵²⁶ The court held that the arson allegation could not have prejudiced the defendants in any practical sense.¹⁵²⁷

The defendants further contended that the prosecutor improperly influenced the grand jury and usurped its role by resolving credibility issues.¹⁵²⁸ The court noted that a prosecutor may not deprive a grand jury of the chance to determine the credibility of witnesses.¹⁵²⁹ The defendants also argued that the government swayed the grand jury against a co-defendant doctor's credibility. The court observed that the government was merely answering a grand juror's question concerning the reason a perjury indictment had not been sought against the doctor.¹⁵³⁰ The court held that the response, even if expansive, was necessary.¹⁵³¹

The defendants also contended that the prosecutor discouraged

may not engage in overreaching conduct that deprives grand jury of autonomous and unbiased judgment)).

1525. *Id.* (citing *United States v. Polizzi*, 500 F.2d 856, 887-88 (9th Cir. 1974) (no reasonable inference of grand jury bias resulted from prosecutor's references to "Mafia" and "Italians"), *cert. denied*, 419 U.S. 1120 (1975)). In *Polizzi*, the court noted that a cautionary instruction cured improper closing remarks by the prosecutor which suggested that the defendant was violent. "The prosecution, as the representative of the government, is expected to follow high standards in conducting its case . . . But during an extensive and fiercely contested trial, we cannot realistically expect perfection." *Polizzi*, 500 F.2d at 892.

1526. 695 F.2d at 1187. "Grand jurors, as a practical matter, . . . are aware that a case is being presented to them because the prosecutor feels that an indictment is warranted. Thus the fact that a prosecutor conveys such an impression to the grand jury does not require the dismissal of the indictment." *United States v. Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981).

1527. 695 F.2d at 1187 (citing *United States v. Scheufler*, 599 F.2d 893, 895 (9th Cir.) (court deemed permissible grand jury testimony of Internal Revenue Service agent that defendant had participated in drug transactions which yielded sums of money), *cert. denied*, 444 U.S. 933 (1979)).

1528. *Id.* *Cf.* *United States v. Thompson*, 576 F.2d 784 (9th Cir. 1978). In *Thompson*, the Ninth Circuit held that the trial court properly refused to submit the defendant's instruction that a witness' testimony may be discredited by prior inconsistent statements. The court held that the jurors were adequately instructed when told that: they were the sole judges of the witness' credibility; they should resolve conflicts in testimony; and they could consider any matter they felt affected the credibility of the witness' testimony. *Id.* at 786.

1529. 695 F.2d at 1187. *See* *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978): "The jury is to determine what, if any, credibility to give . . . [a witness'] testimony."

1530. 695 F.2d at 1187.

1531. *Id.*

grand jurors from looking at the transcripts of former testimony.¹⁵³² The prosecutor had told the jurors that they were free to read them, but that "after a while it gets a little tedious."¹⁵³³ The court held that the prosecutor must not pressure grand jurors into a premature decision or otherwise discourage them from considering the original evidence.¹⁵³⁴ The court referred to *United States v. Samango*,¹⁵³⁵ where the Ninth Circuit overturned an indictment partly because the prosecutor had given the grand jury several former grand jury transcripts and asked it to reach a conclusion within eight days.¹⁵³⁶ In the present case, the court held that the prosecutor's conduct was even more blameworthy.¹⁵³⁷

The Ninth Circuit also found that the prosecutor erroneously stated that it was sufficient for the jurors to believe a witness' summary. One grand juror had expressed doubts as to establishing an essential element of the indictment solely by hearsay of an absent witness. The court held that dissatisfied jurors must not feel that producing anything other than summary hearsay is an inconvenience.¹⁵³⁸ Moreover, the court found that the prosecutor misguided the grand jury in executing its duties. The grand jury must independently determine whether absent declarants, the percipient witnesses of the events establishing the indictment, are credible enough to establish probable cause.¹⁵³⁹ The court noted that even unintentional misconduct can result in usurpation of the grand jury's function.¹⁵⁴⁰ Although the prosecutor has wide discretion in grand jury proceedings, this discretion is not boundless, and he or she may not engage in conduct that deprives the grand jury of independent and unbiased judgment.¹⁵⁴¹ The court emphasized that "[t]he very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his

1532. *Id.*

1533. *Id.*

1534. *Id.* See *United States v. Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981) (no prosecutorial misconduct even though prosecutor presented indictment before close of testimony, provided that grand jury independently adopted indictment as its own).

1535. 607 F.2d 877, 882-83 (9th Cir. 1979).

1536. 695 F.2d at 1187.

1537. *Id.*

1538. *Id.* at 1188.

1539. *Id.*

1540. *Id.* (citing *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979)).

1541. *Id.* at 1184-85. "If the grand jury is to accomplish either of its functions, independent determination of probable cause that a crime has been committed and protection of citizens against unfounded prosecutions, limits must be set on the manipulation of grand juries by overzealous prosecutors." *Id.* at 1185 (quoting *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979)).

fellow citizens acting independently of either prosecuting attorney or judge.'"¹⁵⁴²

The court nonetheless affirmed the conviction. It stressed that it was reviewing a trial court's exercise of its discretion to uphold an indictment, where convictions were based on overwhelming evidence of guilt.¹⁵⁴³ The court also expressed the belief that its opinion would help to prevent prosecutorial misconduct.¹⁵⁴⁴

2. Secrecy and disclosure of grand jury materials

Grand jury hearings are closed and secret. Witnesses' counsel may not enter the chamber, and no judge presides to direct the proceedings. The grand jury deliberates in secret, and it alone determines the course of its investigation.¹⁵⁴⁵ "[T]he grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."¹⁵⁴⁶

1542. *Id.* at 1188 (quoting *Stirone v. United States*, 361 U.S. 212, 218-19 (1960)).

1543. *Id.*

1544. *Id.* at 1189.

1545. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

1546. *Costello v. United States*, 350 U.S. 359, 362 (1956).

The United States Supreme Court explained the need for secrecy during grand jury proceedings in *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)):

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

In *United States v. Kahan & Lessin Co.*, 695 F.2d 1122, 1124 (9th Cir. 1982), the defendants contended that their indictment was invalidated because unauthorized persons intruded during grand jury proceedings in violation of FED. R. CRIM. P. 6(d). The Rule provides:

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no persons other than the jurors may be present while the grand jury is deliberating or voting.

The Ninth Circuit held that since there were no proceedings during the inadvertent intrusions, dismissal was unnecessary. 695 F.2d at 1124 (citing *United States v. Rath*, 406 F.2d 757, 757 (6th Cir.) (interruption did not invalidate grand jury proceedings or indictment, where proceedings stopped at moment of stranger's presence), *cert. denied*, 394 U.S. 920 (1969)). The court based its decision on *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), where five unauthorized intrusions were held to be "rare, inadvertent, and non-prejudicial." *Id.* at 1184-85. The decision

In *In re McElhinney*,¹⁵⁴⁷ the court held that a grand jury witness was entitled to conditional access to: (1) the Attorney General's application to conduct surveillance of his telephone; (2) affidavits submitted in support of the application; (3) the district court's order authorizing surveillance; and (4) affidavits describing the duration of the surveillance.¹⁵⁴⁸

The defendant, a witness, appealed an order of confinement for contempt of court after his refusal to testify before a grand jury. Following his claim of privilege, he was granted immunity and ordered to testify. Arguing that the government had illegally monitored his telephone, he refused to comply.¹⁵⁴⁹

After the government admitted using the court-ordered wiretap, the defendant requested disclosure of certain documents for a limited hearing on the legality of the surveillance. The secrecy of grand jury proceedings was thus called into question. At issue was whether a grand jury witness could have limited access to certain documents concerning the validity of court-ordered electronic surveillance.¹⁵⁵⁰ The court had not previously confronted the question of limited access.¹⁵⁵¹

Departing from the trial court's holding, the Ninth Circuit declared that under certain circumstances a grand jury witness is entitled to limited access to certain documents.¹⁵⁵² The court reasoned that the policy against complete disclosure is not a bar to every disclosure.¹⁵⁵³ If the government objects to disclosure on secrecy grounds, the district court must decide *in camera* whether sensitive materials can be removed or summarized so that the witness may retain access to ex-

in *Computer Sciences Corp.* was motivated by reasons of practicality: "Life must go on. Attainable reality, not perfection, here suffices. It is simply inappropriate to nullify grand jury work stretching out over a period of eighteen months because of technical, trivial, harmless violations of no significant duration of Fed. R. Crim. P. 6(d)." *Id.* at 1185-86.

1547. 698 F.2d 384 (9th Cir. 1983).

1548. *Id.* at 385.

1549. *Id.* at 384.

1550. *Id.* at 385.

1551. *Id.*

1552. *Id.*

1553. *Id.* (citing *In re Lochiatto*, 497 F.2d 803, 807 (1st Cir. 1974)). In *Lochiatto*, the court drew the same conclusion, holding that a grand jury witness was entitled to precisely the documents that McElhinney desired, unless the government showed a need for secrecy. *Id.* at 807-08. The court in *McElhinney* considered this holding when making its decision.

The *McElhinney* court constructed a balancing test, based on *In re Persico*, 491 F.2d 1156, 1161 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974). The court in *Persico* acknowledged the problem of competing policies: exclusion of illegally acquired evidence, and maintenance of uninterrupted grand jury proceedings. *Id.* at 1161. The *McElhinney* court sought a solution that would reconcile these conflicting policies. 698 F.2d at 385-86.

cerpted material.¹⁵⁵⁴ The witness must show the court that a challenge to the electronic surveillance can be supported by the papers then in hand, without admission of additional evidence or a plenary hearing.¹⁵⁵⁵ The court may order the witness to testify or be punished for contempt, if it finds that the affidavits are sufficient to support the surveillance.¹⁵⁵⁶

3. Subpoena duces tecum and attorney-client privilege

The grand jury has the authority to resort to compulsory process to secure the attendance and testimony of witnesses.¹⁵⁵⁷ The Ninth Circuit recently considered two cases involving defendants' objections to a denial of a motion to quash a subpoena duces tecum. In *In re Grand Jury Subpoenas Duces Tecum (Marger)*,¹⁵⁵⁸ the court held that the attorney-client privilege did not destroy the obligation of two attorneys to appear before a grand jury and bring financial records of their fee arrangements with the defendant, where the government already knew the defendant's identity, and the jury sought only information regarding the amount of fees paid.¹⁵⁵⁹ This information is not generally considered an exception to the nonconfidentiality rule.¹⁵⁶⁰

1554. *Id.* at 385 (citing *In re Lochiatto*, 497 F.2d 803, 808 (1st Cir. 1974)).

1555. *Id.* at 385-86. See *In re Gordon*, 534 F.2d 197, 199 (9th Cir. 1976) (appellant, a recalcitrant witness, could not delay grand jury proceedings while litigating question of validity of electronic surveillance).

1556. 698 F.2d at 386.

1557. *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (by conferring immunity, court can compel testimony from unwilling witness who invokes fifth amendment).

The court may exercise its discretion to summon witnesses to give testimony before the grand jury. *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977). "[I]t is the court which must compel a witness to testify if, after appearing, he refuses to do so." *Brown v. United States*, 359 U.S. 41, 49 (1959). The United States Supreme Court has noted that "'citizens generally are not constitutionally immune from grand jury subpoenas'" and that "'the long-standing principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings.'" *United States v. Calandra*, 414 U.S. 338, 345 (1974) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 682, 688 (1972)).

1558. 695 F.2d 363 (9th Cir. 1982).

1559. *Id.* at 365.

1560. *Id.* If one party shows a legitimate need for such information, the disclosure of the identity of an attorney's clients and their fee arrangements are not confidential communications under the attorney-client privilege. *United States v. Sherman*, 627 F.2d 189, 190 (9th Cir. 1980) (amount of legal fees was not protected by attorney-client privilege, since disclosure would not implicate client in any known prior criminal activity); *United States v. Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977) (attorney-client privilege does not protect communications made in furtherance of criminal activities).

Such information is, however, privileged when the person invoking the privilege can demonstrate that disclosure would probably implicate the client in the same matter for which he or she sought legal advice in the first place. 695 F.2d at 365 (citing *Baird v. Koer-*

The defendant, the target of a grand jury proceeding, appealed from an order denying his motion to quash the grand jury subpoenas duces tecum served on his former attorneys. He argued that the specific questions contained in the attorneys' subpoenas exceeded inquiry into legal fees by seeking to identify the co-conspirators or others who may have paid them. The court ruled that the issue was not ripe for judicial review, because the subpoenas only commanded appearance before the grand jury.¹⁵⁶¹ An answer to the subpoena would not amount to waiver of any right or privilege regarding questions attached to the subpoenas.¹⁵⁶² The court stated that the grand jury hearing would be the proper forum for the defendant or his attorneys to assert any privileges which they might wish to raise.¹⁵⁶³ A determination of privileges should be made on the merits by the district court after they have been asserted at the grand jury proceeding.¹⁵⁶⁴

In *In re Grand Jury Witness (Salas)*,¹⁵⁶⁵ the court held that subpoenas seeking attorney time records describing services performed by attorneys for clients created an unjustified intrusion into the attorney-client relationship.¹⁵⁶⁶ The defendants were two attorneys for tax protestors who were under investigation by a grand jury.¹⁵⁶⁷ The attorneys appealed from an order finding them in contempt for refusing to provide documents concerning their employment by the targets of the investigation.¹⁵⁶⁸ The subpoenas sought attorney time records describing services performed by them, retainer agreements, contracts, and letters of agreement. The attorneys filed a motion to quash the subpoenas for various reasons, including the attorney-client privilege.¹⁵⁶⁹

ner, 279 F.2d 623, 630 (9th Cir. 1960) (attorney-client privilege protects ultimate motive of litigation)). The court in *Marger* noted that the courts have narrowly applied this exception, and the court was unwilling to apply it here. *Id.*

1561. *Id.* at 366.

1562. *Id.*

1563. *Id.*

1564. *Id.* In *Lowthian v. United States*, 575 F.2d 1292, 1293 (9th Cir. 1978), the Ninth Circuit held that the appropriate procedure for challenging a subpoena duces tecum is that the attorney should refuse to produce the documents and then appeal any contempt judgment entered against him or her.

1565. 695 F.2d 359 (9th Cir. 1982).

1566. *Id.* at 362.

1567. The tax protest organization was the Belanco Religious Order, which espoused the belief that payment of income taxes was immoral. *Id.* at 360.

1568. *Id.*

1569. *Id.* at 360-61. The other theories underlying the motion included invasion of privacy under the California State Constitution, violation of the first amendment, failure of the grand jury to authorize the subpoenas, and the privilege against self-incrimination. The district court summarily rejected these theories. *Id.* at 361 n.2.

The district court denied the motion to quash. The court then conducted a brief contempt hearing based on one attorney's stated intent to refuse to comply with the subpoenas. The attorneys were held in contempt and filed notices of appeal.¹⁵⁷⁰

On appeal, the defendants asserted a blanket claim that all of the demanded information was protected by the attorney-client privilege.¹⁵⁷¹ The court held that the subpoenas were in fact an unjustified intrusion into the attorney-client relationship insofar as they sought time records, retainer agreements, contracts and letters of agreement.¹⁵⁷² However, the court observed that the defendants failed to meet their burden of explaining how disclosure of attorney fees would incriminate their clients in the activity for which they sought legal advice.¹⁵⁷³ For this reason the court held that the district court properly denied the motion to quash the subpoenas with respect to attorney fees.¹⁵⁷⁴

The court did not stop its analysis at this juncture. The court stressed that the subpoenas demanded more than the amount of attorney fees and method of payment. A simple invoice requesting payment for unspecified services would not normally be privileged, as it reveals nothing more than the amount of the fee. The attorney-client privilege would, however, cover bills, ledgers, statements, and time records, which, as in the present case, reveal the nature of the services provided.¹⁵⁷⁵ The court noted that any correspondence between an attorney and client which reveals the client's ultimate motive for litigation or retention of an attorney would be protected.¹⁵⁷⁶

1570. *Id.* at 361.

1571. *Id.*

1572. *Id.* at 362. The court applied the same standard used in *In re Grand Jury Subpoenas Duces Tecum* (Marger), 695 F.2d 363, 365 (9th Cir. 1982), but arrived at a different conclusion. See *supra* note 1560. Both courts cited *Baird v. Koerner*, 279 F.2d 623, 630 (9th Cir. 1960); *United States v. Sherman*, 627 F.2d 189, 191-92 (9th Cir. 1980); and *United States v. Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977), for the following proposition: a narrow exception to the attorney-client privilege applies when revealing that information probably would incriminate a client on the same charges for which he or she originally sought legal assistance. 695 F.2d at 361-62. Similarly, the United States Supreme Court in *Fisher v. United States*, 425 U.S. 391, 401-05 (1976), held that if a client submitted documents to an attorney while seeking legal advice, the attorney may assert the attorney-client privilege in response to a subpoena duces tecum. This rule applies, however, only if the client would have a fifth amendment privilege if the documents had remained in his or her possession. *Id.* at 404.

1573. 695 F.2d at 362.

1574. *Id.*

1575. *Id.*

1576. *Id.* (citing *In re Grand Jury Proceedings* (Jones), 517 F.2d 666, 674-75 (5th Cir. 1975) (attorney-client privilege protected names of persons who might have arranged for bonds

Thus the court held that the subpoenas for time records constituted an unjustified intrusion into the attorney-client relationship.¹⁵⁷⁷ The subpoenas required *in camera* inspection by the district court, and the defendants should have explained how the privilege covered the information.¹⁵⁷⁸ *In camera* inspection permits the court to issue a protective order for any privileged portions before the grand jury receives them.¹⁵⁷⁹

4. Refusal to appear and testify before the grand jury

In *In re Grand Jury Proceedings (Ortloff)*,¹⁵⁸⁰ the Ninth Circuit held that a conviction could not be reversed on the ground that the judge neglected to state "you are hereby ordered," because he had repeatedly informed the defendant of his obligation to appear and testify before the grand jury.¹⁵⁸¹

The defendant, a prisoner in state custody, appealed his conviction for criminal contempt. The federal district court had issued a writ of *habeas corpus ad testificandum* to compel the defendant's appearance before a grand jury.¹⁵⁸² The court did not issue a grand jury subpoena requiring him to appear and testify. The defendant refused to comply.¹⁵⁸³

and legal fees on clients' behalf, since the information would have pertained to criminal activity of suspects of income tax offenses)). See *supra* note 1560. The grand jury may not compel a person to produce books and papers that would incriminate him or her. *United States v. Calandra*, 414 U.S. 338, 346 (1974) (citing *Boyd v. United States*, 116 U.S. 616, 633-35 (1886)).

1577. 695 F.2d at 362.

1578. *Id.* The court decided to allow the defendants to make the required showing on remand. *Id.*

1579. *Id.*

1580. 708 F.2d 1455 (9th Cir.), *cert. denied*, 104 S. Ct. 506 (1983).

1581. *Id.* at 1457.

1582. *Id.* at 1456.

1583. *Id.* The grand jury may compel the testimony of witnesses as it deems appropriate; its operation is unhampered even by the technical procedure and evidentiary rules regulating the conduct of criminal trials. *United States v. Calandra*, 414 U.S. 338, 343 (1974). Quoting *Blair v. United States*, 250 U.S. 273, 282 (1919), the Court in *Calandra* observed:

It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

414 U.S. at 343.

The power of a federal court to require witnesses to appear and testify before a grand jury is well established. *Kastigar v. United States*, 406 U.S. 441, 443 (1972). All citizens have a duty to testify when their government so requests. *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) ("citizens generally are not constitutionally immune from grand

The United States Attorney applied for an order requiring the defendant to show cause as to why he should not be held in criminal contempt, under 18 U.S.C. section 401(3), and civil contempt, under 28 U.S.C. section 1826.¹⁵⁸⁴ A hearing was held, at which the judge explained to the defendant the consequences of failing to testify and told him that he was compelled to testify.¹⁵⁸⁵ When the defendant still refused, the judge issued an order for him to show cause why he should not be held in criminal contempt.¹⁵⁸⁶

At the conclusion of the trial for criminal contempt, the judge found the defendant guilty of willful refusal to appear and testify.¹⁵⁸⁷ The defendant was sentenced to six months' confinement. He was given ten days to purge the contempt charge by testifying before the grand jury.¹⁵⁸⁸

On appeal, the defendant argued that the judge had erred by failing to enter an order requiring him to testify. The Ninth Circuit disagreed, holding that, despite the fact that the word "order" was not

jury subpoenas"). Compelling an individual by subpoena to appear before a grand jury does not constitute a fourth amendment seizure, even though the summons may be inconvenient or burdensome. *United States v. Dionisio*, 410 U.S. 1, 9 (1973) (grand jury's directive to make voice recording did not infringe on fourth amendment interest). For a discussion of the Supreme Court's longstanding acknowledgment of a citizen's duty to appear and give evidence before the grand jury, see *Kastigar*, 406 U.S. at 443-44; *Blair v. United States*, 250 U.S. 273, 279-81 (1919); *Dionisio*, 410 U.S. at 9-13; 8 J. WIGMORE, EVIDENCE § 2191 (1961).

1584. 18 U.S.C. § 401(3) (1976) provides: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command."

28 U.S.C. § 1826 (1976) provides in pertinent part: "Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . , the court . . . may summarily order his confinement."

1585. 708 F.2d at 1457. At the hearing the defendant told the judge that he had refused to testify because he had no knowledge of the issues in question. The judge told him that if he was unable to answer questions because of his lack of knowledge, he should have stated so in his testimony in the grand jury room. *Id.*

In *United States v. Calandra*, 414 U.S. 338, 349 (1974), the Supreme Court considered whether a grand jury witness could refuse to testify on the ground that the questions were based on evidence obtained from an unlawful search and seizure. The Court applied a balancing test, weighing any possible damage to the grand jury's role against the potential benefits of applying the exclusionary rule to grand jury proceedings. *Id.* at 349-50. The Court concluded that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective discharge of the grand jury's duties, and would achieve only a speculative effect in deterring police misconduct. *Id.* at 350-52.

1586. 708 F.2d at 1457.

1587. *Id.*

1588. *Id.*

used, the meaning of the hearing was unequivocal.¹⁵⁸⁹ The court ruled that "[t]he statement of an additional order in the circumstances would have been a mere formality."¹⁵⁹⁰ Since the judge's instructions clearly informed the defendant of his obligation to testify, requiring the words "you are hereby ordered" would have elevated form over substance.¹⁵⁹¹

The Ninth Circuit observed that the defendant was brought before the court to determine if an order to show cause for contempt should be entered.¹⁵⁹² The court deemed it preferable to bring him before the court to ascertain whether to enter an order to compel his testimony.¹⁵⁹³ At the hearing for an order to compel testimony, the grand jury witness should be informed of the consequences of failure to testify after being ordered to do so. If the witness still refuses to testify, without giving a lawful reason, and if the situation warrants, a specific unequivocal order should be entered, requiring the witness to answer the grand jury questions. If the witness again refuses to testify, he or she should be given notice that a citation for contempt will be forthcoming. A time should then be set for trial on the contempt citation.¹⁵⁹⁴

The Ninth Circuit observed that in the present case the court did not determine if an order to compel testimony before the grand jury should be entered.¹⁵⁹⁵ Nonetheless, the essence of that procedure was followed, which was sufficient to uphold the judgment of criminal contempt.¹⁵⁹⁶

The court rejected the defendant's contention that he should have been given *Miranda*¹⁵⁹⁷ warnings before being required to answer the judge's questions at the hearing.¹⁵⁹⁸ The court reasoned that since the

1589. *Id.* (citing *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 195 (9th Cir. 1979) ("[c]riminal contempt is established where there is a clear and definite order of the court, the contemnor knows of the order, and the contemnor willfully disobeys the order")).

1590. *Id.*

1591. *Id.*

1592. *Id.*

1593. *Id.*

1594. *Id.* at 1457-58.

1595. *Id.* at 1458.

1596. *Id.*

1597. *Miranda v. Arizona*, 384 U.S. 436 (1966). In the absence of other effective procedures, the following measures to protect the fifth amendment privilege against self-incrimination must be taken. Before interrogation, the person in custody must be clearly informed that: he has the right to remain silent, and that anything he says will be used against him in court; he has the right to consult with an attorney and to have the attorney with him during the investigation; and if he is indigent, an attorney will be appointed to represent him. *Id.* at 467-73.

1598. 708 F.2d at 1458.

hearing was ancillary to grand jury proceedings¹⁵⁹⁹ and there was no custodial interrogation,¹⁶⁰⁰ *Miranda* warnings were not required.

The court also denied the defendant's claim that he was entitled to counsel at the hearing.¹⁶⁰¹ The court noted that the sixth amendment right to counsel "'attaches only upon the initiation of adversary judicial criminal procedures.'"¹⁶⁰² Thus the court properly appointed counsel once the judge decided that criminal contempt proceedings would be brought.

5. Composition of the grand jury

In *United States v. Suttiswad*,¹⁶⁰³ the Ninth Circuit held that the trial court properly denied a request for funds for expert assistance to show that blacks were underrepresented on grand juries in the Northern District of California.¹⁶⁰⁴ The court held that blacks were not substantially underrepresented under Ninth Circuit standards, even though there was one fewer black juror than required to achieve perfect numerical representation.¹⁶⁰⁵

The defendant was convicted of importing heroin and possessing it with intent to distribute.¹⁶⁰⁶ On appeal, he filed a motion to stay proceedings, grant discovery, and dismiss the indictment. He argued that the grand jury selection procedures in the district did not satisfy the Jury Selection and Service Act and the fifth and sixth amendments.¹⁶⁰⁷ He contended that the grand jurors were not chosen randomly from a fair cross-section of the community and that the selection methods un-

1599. *Id.* (citing *United States v. Mandujano*, 425 U.S. 564, 579 (1976) (purpose of *Miranda* warnings is to avoid evils occurring during police interrogation of person in custody)).

1600. *Id.* (citing *Cervantes v. Walker*, 589 F.2d 424, 427-28 (9th Cir. 1978) (*Miranda* warnings not required where questioning of prisoner took place in prison library)).

1601. *Id.*

1602. *Id.* (quoting *Fritchie v. McCarthy*, 664 F.2d 208, 214 (9th Cir. 1981) (where right to counsel under *Miranda* was never invoked, there was no need for discrete inquiry into effectiveness of waiver of that right)).

1603. 696 F.2d 645 (9th Cir. 1982).

1604. *Id.* at 649.

1605. *Id.*

1606. 21 U.S.C. § 952(a) (1976) provides in pertinent part: "It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any . . . narcotic drug"

21 U.S.C. § 841(a)(1) (1976) provides in pertinent part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to . . . possess with intent to . . . distribute . . . a controlled substance"

1607. 696 F.2d at 648. Under the Jury Selection and Service Act, 28 U.S.C. § 1867(a) (1976), a defendant may move to dismiss an indictment and stay proceedings on the ground of substantial failure to comply with the Act in the selection of grand or petit jurors. The

lawfully excluded racial and ethnic minorities. A statistician concluded that racial disparities existed in the composition of past grand juries, suggesting that some non-random selection occurred in the district.¹⁶⁰⁸

The defendant then sought funds under the Criminal Justice Act, 18 U.S.C. section 3006(a),¹⁶⁰⁹ to finance professional assistance in compiling and interpreting statistical data. Two attorneys filed affidavits, asserting that expert services could be provided "if the attorney had a client who had the independent means to pay for them."¹⁶¹⁰ The court denied the motion for funds for expert assistance.

The Ninth Circuit held that grand jury underrepresentation in absolute terms of blacks by 2.8%, of Hispanics by 7.7%, and of Asians by 4.7% fell within allowable limits.¹⁶¹¹ The court's determination of adequate representation depended on numbers, not percentages. In a grand jury of twenty-three people, there would be underrepresentation of blacks by less than one juror, and underrepresentation of Hispanics and Asians by slightly more than one juror. Under these circumstances, the court found no error in the district court's refusal to allow

defendant may present records and any relevant evidence to support his or her claim. 28 U.S.C. § 1867(d) (1976).

The fourteenth amendment prohibits racial discrimination in the selection of grand and petit juries. All states acknowledge improper selection of the grand jury as a ground for a motion to dismiss, at least where the defendant lacked the chance to present a pre-indictment challenge. The United States Supreme Court has held repeatedly that the grand jury may not be chosen in a manner that deliberately and systematically discriminates against any race. *See, e.g.,* *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (white petitioner had standing to attack systematic exclusion of blacks from grand jury and petit jury service); *Neal v. Delaware*, 103 U.S. 370, 391 (1880) (blacks cannot be excluded from jury due to discrimination); *Smith v. Texas*, 311 U.S. 128, 130 (1940) (black defendant had right to challenge systematic exclusion of blacks from his grand and petit juries).

Nonetheless, equal protection does not mandate proportional representation of all component groups of a community on every grand jury. *See, e.g.,* *United States v. Brady*, 579 F.2d 1121, 1134 n.3 (9th Cir. 1978) (absence of Indians on three successive grand jury panels did not constitute "substantial deviation"), *cert. denied*, 439 U.S. 1074 (1979). Various circuits have expressly held that in accordance with 28 U.S.C. § 1863(b)(3) of the Jury Selection and Service Act, jurors for a particular division should be selected from counties, parishes, or similar political subdivisions; they need not come from the entire district of which the subdivision is a part. *See, e.g.,* *United States v. Florence*, 456 F.2d 46, 49 (4th Cir. 1972); *United States v. Anzelmo*, 319 F. Supp. 1106, 1111-12 (E.D. La. 1970).

1608. 696 F.2d at 648.

1609. *Id.* 18 U.S.C. § 3006(A) (1976) provides in pertinent part:

Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense.

1610. 696 F.2d at 648.

1611. *Id.* at 649.

funds to hire an expert.¹⁶¹²

B. Indictments

1. Essential elements

Rule 7 of the Federal Rules of Criminal Procedure states that an indictment must be a "plain, concise and definite written statement of the essential facts constituting the offense charged."¹⁶¹³ The courts will review the indictment to see if it satisfies a defendant's inalienable right "to be informed of the nature and cause of the accusation"¹⁶¹⁴ against him. In so doing, the courts have concluded that the document must set forth the elements of the offense charged, contain a statement of the facts and circumstances that will inform the accused of the elements of the specific offense,¹⁶¹⁵ and enable him to plead double jeopardy against prosecution for the same offense.¹⁶¹⁶

1612. The court followed the holding of *United States v. Armstrong*, 621 F.2d 951, 956 (9th Cir. 1980): "[A] reasonable attorney, after determining that there was no substantial disparity in . . . representation . . . on the grand jury panel, would not decide, necessarily, to incur the additional expense of retaining an expert statistician to analyze the master wheel." *Armstrong* held that a court should rely on a test of substantiality based on absolute numerical composition of the grand jury. *Id.* at 955-56. *See also* *United States v. Kleifgen*, 557 F.2d 1293, 1296 (9th Cir. 1977) (defendant failed to show that blacks or males were substantially underrepresented on grand jury).

The court in *Suttiswad* also dealt briefly with the argument that there was prosecutorial error, which it summarily rejected. 696 F.2d at 652-53. The defendant argued that the prosecutor committed plain error in closing argument by commenting on highly incriminating evidence outside the record. *Id.* at 652. During cross-examination, the defendant established that whoever hid contraband in a suitcase must have handled the false linings, but the government had not attempted to find fingerprints. During closing argument, defense counsel argued that this was a "major investigative failure," commenting that the evidence would have been offered had it been incriminating. The prosecutor remarked in rebuttal: "If we had fingerprints, we might have had more defendants in here. Maybe we have the defendant's fingerprints, but that's not part of what you should consider." *Id.* at 652-53. The defendant argued that the prosecutor implied that the government did have the fingerprints, but considered the evidence a diversion and thus refrained from producing the fingerprints at trial. *Id.* at 653. The Ninth Circuit held that the comments were merely fair rebuttal to counsel's argument, created no sinister connotation, and thus did not constitute plain error. *Id.*

1613. FED. R. CRIM. P. 7(c)(1) provides: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

1614. U.S. CONST. amend. VI.

1615. *Hamling v. United States*, 418 U.S. 87, 117-19 (1974). *See also* *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979) (indictment fails where insufficient facts alleged and other allegations left open-ended).

1616. *Russell v. United States*, 369 U.S. 749 (1962) (legally sufficient indictment must state elements of offense with sufficient clarity to enable defendant to defend himself and plead double jeopardy).

The Ninth Circuit, in concluding that the indictment was sufficient in *United States v. Buckley*,¹⁶¹⁷ relied on common sense and reasonable inferences¹⁶¹⁸ when the government appealed the dismissal of one count of mail fraud¹⁶¹⁹ against the defendant Buckley.¹⁶²⁰ Defendants were indicted for distributing monies on behalf of the Washington Water Power Company (WWPC) to Washington State legislators. Such distributions were not reported in violation of Washington law.¹⁶²¹

Before reaching its decision on a de novo basis, the Ninth Circuit discussed the standard for review in determining the sufficiency of an indictment. First, an indictment must state the elements of the charged crime in sufficient detail so that the defendant will be informed of the charges and will be able to plead double jeopardy.¹⁶²² The court noted that two corollary purposes of the indictment are "(1) to ensure that the defendants are being prosecuted on the basis of the facts presented to the grand jury, and (2) to allow the court to determine the sufficiency of the indictment."¹⁶²³ In addition, the presumption is that the allegations of the indictment are true,¹⁶²⁴ and that these allegations

1617. 689 F.2d 893 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1778 (1983).

1618. *Id.* at 899.

1619. 18 U.S.C. § 1341 (1976) provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Office Department . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

1620. The district court in granting the dismissal determined that there was not only the lack of explicit allegation, but also the lack of sufficient facts to support the implicit allegation that the document was false and mailed in furtherance of the scheme to defraud. 689 F.2d at 896.

1621. *Id.* at 895. *See* WASH. REV. CODE ANN. §§ 42.17.170, 42.17.180 (Supp. 1984).

1622. 689 F.2d at 896 (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)).

1623. *Id.* The court noted that the corollary purposes will generally be met if, before trial, the defendant is informed of the charges so that he may defend himself and plead double jeopardy. *Id.* at 896 n.3 (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Chenaour*, 552 F.2d 294, 301 (9th Cir. 1977) (indictment is sufficient if it fairly informs defendant of charge and allows defendant to plead double jeopardy). Additionally, if, after trial, the government's theory for conviction is clear, the corollary purposes assume additional importance. *Id. See, e.g., United States v. Stewart Clinical Laboratory*, 652 F.2d 804, 807 (9th Cir. 1981) (court may not substantially amend indictment through jury instructions); *United States v. Gordon*, 641 F.2d 1281, 1285-87 (9th Cir.) (charge of "bribery of executive or administrative officers" rather than "bribery of public officers" not constructive amendment, nor did it deprive jury of determining each essential element of offense), *cert. denied*, 454 U.S. 859 (1981).

1624. 689 F.2d at 897 (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n.16 (1952)).

need only be the essential facts that are necessary to inform a defendant of the crime or crimes charged.¹⁶²⁵ Later, in its determination, the court also stated that an indictment should be "(1) read as a whole; (2) read to include facts which are necessarily implied; and (3) construed according to common sense."¹⁶²⁶

With this standard for review, the court then considered the allegations of the indictment against what is required under the mail fraud statute. When charging a defendant with mail fraud, the Ninth Circuit has determined that the prosecutor need only make the specific factual allegations regarding the mailing in furtherance of the scheme to defraud.¹⁶²⁷ The defendants attacked the sufficiency of the indictment claiming that it failed to state either of the essential elements.¹⁶²⁸ The court concluded that the allegations in the indictment that the citizens of Washington were deprived of their statutory right to know who made what political payments to whom, and that when defendant filed the reports, he intentionally did not disclose the money that was paid to him, were sufficient to adequately allege a scheme to defraud.¹⁶²⁹

The defendants also argued that the indictment was insufficient as to the element of the use of the mails to execute the scheme to defraud.¹⁶³⁰ However, the government argued that the allegation of a

1625. *Id.* (citing *United States v. Markee*, 425 F.2d 1043, 1047-48 (9th Cir.), *cert. denied*, 400 U.S. 847 (1970)). Thus, the government "need not allege its theory of the case or supporting evidence." *Id.*

1626. *Id.* at 899. See *United States v. Inryco, Inc.*, 642 F.2d 290, 294 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982); *United States v. Anderson*, 532 F.2d 1218, 1222 (9th Cir.), *cert. denied*, 429 U.S. 839 (1976). The court also noted that the rule that indictments challenged after trial are liberally construed in favor of validity did not apply to this case where defendant timely challenged the indictment before trial.

1627. 689 F.2d at 900. The court cited *United States v. Livengood*, 427 F.2d 420, 423 (9th Cir. 1970), where the "mail fraud indictment couched in the language of the statute was sufficient and met the requirements of FED. R. CRIM. P. 7(c) where the alleged schemes were particularized in some detail." 689 F.2d at 900.

1628. 689 F.2d at 896. According to this court, the essential elements of mail fraud under 18 U.S.C. § 1341 are: "(1) a scheme to defraud; and (2) a knowing use of the mail to execute the scheme." *Id.* at 897 (citing *United States v. Kaplan*, 554 F.2d 958, 965 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977)).

1629. 689 F.2d at 898. In reaching its conclusion, the court relied on its holdings in *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.) (depriving an employer of one's honest services and of its right to have its business conducted honestly can constitute a scheme to defraud), *cert. denied*, 447 U.S. 928 (1980), and *United States v. Louderman*, 576 F.2d 1383 (9th Cir.) (scheme to gather private information by deception was fraudulent), *cert. denied*, 439 U.S. 896 (1978). The court concluded that a fraudulent scheme may include one that is "contrary to public policy or which fail[s] to measure up to the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" 689 F.2d at 897 (quoting *Bohonus*, 628 F.2d at 1171).

1630. 689 F.2d at 898. The district court agreed with defendant's claim, concluding that

false mailing is "evidentiary in nature" and thus, it need not explicitly state the filing of a false form in the indictment.¹⁶³¹ The Ninth Circuit agreed with the government because dishonesty was implied when the government alleged "a money laundering scheme, payments to legislators as a result of that scheme, and the mailing of the specific report in furtherance of the scheme."¹⁶³² Thus, since the indictment implicitly alleged the falsity of the disclosure report, the court concluded that it was clear enough to meet the *Hamling* standard of giving the defendant adequate notice of the crime charged to plead double jeopardy and prepare a defense.¹⁶³³

The defendants in *United States v. Christopher*¹⁶³⁴ were charged and convicted of the misdemeanor of being present on federal property after normal working hours.¹⁶³⁵ The defendants were members of an organization whose goal was the passage of the California Marijuana Initiative. Seeking to collect signatures for a petition in support of the initiative and to distribute information and to register voters, the defendants set up a table on the corner of the federal building property in West Los Angeles. In so doing, they announced their intention to occupy the area continuously for seventeen days. After repeated requests by Federal Protective Service officers to leave the area after normal working hours, many of the group members left the area. However, the defendants did not leave, and accordingly, they were cited.

the indictment failed because it should have been alleged that the WWPC filed a *false* Lobbyist Employer's Report that did not disclose payments to legislators. *Id.* (emphasis in original).

1631. *Id.* at 898.

1632. *Id.* The court determined that the indictment implicitly alleged the falsity of the disclosure report based on its analysis of three specific allegations in the indictment. The first allegation was that WWPC had set aside money for payments to legislators. The second allegation was that the payments to legislators were intentionally omitted from the disclosure statement. The third allegation was that the WWPC mailed the disclosure form in furtherance of the alleged scheme. Reading these allegations together, the court concluded that "[t]he only way that the . . . form could have been mailed in furtherance of the alleged scheme . . . is for WWPC [to have] intentionally omit[ted] the payments to legislators from the disclosure statement" *Id.* at 899. *See also* Pipefitters Local Union v. United States, 407 U.S. 385, 439 n.48 (1972) (dictum) (reading allegations of an indictment together to draw inferences to determine sufficiency).

1633. The court found this to be so, despite the fact that it considered the indictment to be confusing, lengthy and largely irrelevant. 689 F.2d at 900.

1634. 700 F.2d 1253 (9th Cir.), *cert. denied*, 103 S. Ct. 2436 (1983).

1635. This is a violation of 41 C.F.R. §§ 101-20.302 and 101-20.315 (1981). Although the violation occurred after the 1981 amendment, the district court used the 1978 version. However, even though not an issue on appeal, the Ninth Circuit concluded that any changes made in the 1981 amendment were insubstantial and insignificant to the issue at hand. 700 F.2d at 1255 n.1.

The defendants appealed their convictions on a number of grounds,¹⁶³⁶ including that the charging information was vague and indefinite.¹⁶³⁷ They claimed that the information neither stated the times that the defendants were trespassing, nor defined the "normal working hours" of the federal facility.¹⁶³⁸

The Ninth Circuit in *Christopher* first outlined the requirements for stating the elements of a legally sufficient indictment. It stated that an indictment must state with sufficient clarity the elements of the crime charged, so as to inform a defendant and permit him to prepare an adequate defense.¹⁶³⁹ The court also noted that if the indictment fails to allege an essential element of the offense, it may be considered insufficient.¹⁶⁴⁰ However, the court concluded that more specific information was not necessary to the charge so long as the defendants were sufficiently informed of the charges against them.¹⁶⁴¹ On the facts of this case, the court determined that there was no indication that the defendants were not fully aware of the nature of the charges against them and that nothing suggested that the phrase "normal working hours" meant anything so unusual that they would have to guess at its meaning.¹⁶⁴²

In *Kreck v. Spalding*,¹⁶⁴³ however, the Ninth Circuit found that the indictment was insufficient in stating the essential elements of the crime charged. Kreck, a Washington prisoner, was convicted of second-degree felony murder in state court.¹⁶⁴⁴ In his petition before the district court, Kreck contended that the information filed by the state failed to specifically set forth which subsection of the second-degree assault stat-

1636. See *infra* notes 1789-97 and accompanying text.

1637. 700 F.2d at 1255-56.

1638. *Id.* at 1247.

1639. *Id.* at 1257 (citing *Russell v. United States*, 369 U.S. 749, 763-64 (1962)). See also *United States v. Anderson*, 532 F.2d 1218, 1222 (9th Cir.) (indictment should be read in its entirety, construed according to common sense and interpreted to include facts which are necessarily implied), *cert. denied*, 429 U.S. 839 (1976).

1640. 700 F.2d at 1257 (citing *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979) (bill of particulars cannot save an invalid indictment that fails to allege an essential element of the offense)).

1641. *Id.* (citing *United States v. Inryco, Inc.*, 642 F.2d 290, 294 (9th Cir. 1981) (the courts should consider the "plain language" and "inferences" when interpreting the indictment), *cert. denied*, 454 U.S. 1167 (1982)).

1642. *Id.*

1643. 721 F.2d 1229 (9th Cir. 1983).

1644. Kreck's conviction was reversed by the court of appeals, but that decision was reversed by the state supreme court, affirming the trial court's conviction. Kreck then filed a petition for a writ of habeas corpus with the United States District Court. The writ was granted and the state appealed. *Id.* at 1230-31.

ute he violated, thereby depriving him of due process of law.¹⁶⁴⁵

The district court, in reaching its decision, found the information to be defective on two grounds.¹⁶⁴⁶ First, the information failed to allege two of the essential elements of the second-degree assault charge.¹⁶⁴⁷ Second, the information failed to identify the specific crime which was assisted by the second-degree assault.¹⁶⁴⁸ The district court concluded that under federal law, the information was "fatally defective" since Kreck was not given "adequate notice of the charges against him to enable him to adequately prepare his defense."¹⁶⁴⁹

The Ninth Circuit in *Kreck* acknowledged two purposes for requiring that the charging document furnish a defendant with a sufficient description of the charge against him. First, it enables the defendant to adequately prepare his defense and second, it enables him to plead double jeopardy against a second prosecution for the same offense.¹⁶⁵⁰ The court then affirmed the district court's ruling that the information was legally insufficient because it failed to serve the first intended function by not providing Kreck with adequate notice of the charges against him so as to enable him to prepare his defense.¹⁶⁵¹ It concluded that the mandated inquiry showed that Kreck was prejudiced in the preparation of his defense by the failure to set forth the crime upon which the second-degree assault under subsection 2 of the Washington Revised Code was founded.¹⁶⁵²

1645. *Id.* at 1231.

1646. Under the fourteenth amendment, the constitutional sufficiency of an information is determined under federal law. *Id.* at 1232.

1647. Those elements were "that the conduct of Kreck (1) enabled and assisted him to (2) commit any crime." *Id.*

1648. The Washington "Assault in the Second Degree" statute states seven situations whereby a defendant's conduct will constitute second degree assault. WASH. REV. CODE § 9.11.020 (1974). 721 F.2d at 1231 & n.4.

1649. 721 F.2d at 1232.

1650. *Id.* (citing *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Gordon*, 641 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 859 (1981); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 298 (1980); *United States v. Cecil*, 608 F.2d 1294 (9th Cir. 1979)).

1651. The court found that the information, which charged the accused with second-degree felony murder under Washington state law on the basis of death occurring from the accused's use of chloroform on the victim, was constitutionally inadequate. It failed to specify whether the accused was charged with administering chloroform "with intent to injure," or in the alternative, with intent "to enable or assist himself or any other person to commit any crime." If the charge was made on the latter basis, it failed to specify what underlying crime the accused was charged with having committed. 721 F.2d at 1233.

1652. *Id.* See *supra* note 1648. Support for this conclusion was found in a decision of the Washington State Supreme Court. *State v. Kreck*, 86 Wash. 2d 112, 542 P.2d 782 (1975). In its appeal, the state set forth some interesting suggestions. First, it proposed that requiring the inclusion of the underlying crime on which the second-degree assault is founded "would

In *United States v. Mehrmanesh*,¹⁶⁵³ the defendant was found guilty of importing heroin, attempting to possess with intent to distribute heroin, and with aiding and abetting these offenses.¹⁶⁵⁴ Appealing his conviction, Mehrmanesh claimed that the aiding and abetting charge was fatally defective because "it did not name the principal whom he was charged with aiding and abetting."¹⁶⁵⁵ The Ninth Circuit, however, easily dismissed this claim as the court had previously found that the identification of the principal is not an essential element of the offense of aiding and abetting, and thus, not a fatal defect.¹⁶⁵⁶

In *United States v. McCown*,¹⁶⁵⁷ the defendants were convicted of crimes relating to conspiracy and the distribution of cocaine and firearms.¹⁶⁵⁸ Grounds for their appeal included the claim that one of the counts of the indictment lacked sufficient specificity.¹⁶⁵⁹ Specifically, two of the defendants claimed that the conspiracy counts did not state with sufficient specificity the time during which the conspiracy took

institute a return to code pleading," thereby defeating the purpose of simplifying the technical requirements of common law pleading and avoiding forcing a defendant to trial without properly informing him of the crime with which he is charged. 721 F.2d at 1233. Both the district court and the Ninth Circuit dismissed this suggestion as "merely begging the issue at hand." *Id.* A second suggestion set forth by the state was that the inclusion of the term "chloroform" in the information necessarily limited the violation at issue to subsection 2 of the second-degree assault statute, § 9.11.020 RCW. The district court accepted this proposal. However, the Ninth Circuit disagreed, finding that Kreck's violation could fall within the "purview of either subsection 1 or subsection 2 of that statute." Thus, the Ninth Circuit determined that to allow the state to charge in such nebulous terms and to proceed to trial on either subsection would be a violation of the "principle of fundamental fairness on which due process of law is bottomed." 721 F.2d at 1233.

1653. 689 F.2d 822 (9th Cir. 1982).

1654. The charge of aiding and abetting the listed offenses was included in a superseding indictment. *Id.* at 825.

1655. *Id.* at 835.

1656. *Id.* (citing *United States v. King*, 587 F.2d 956, 963 (9th Cir. 1978) (failure of indictment to detail each element of offense generally constitutes fatal defect)). *But see United States v. Chenaar*, 552 F.2d 294, 300 (9th Cir. 1977) (identification of principal not an essential element of charge of aiding and abetting); *Feldstein v. United States*, 429 F.2d 1092, 1095 (9th Cir.) (identification of principal not an essential element of charge of aiding and abetting), *cert. denied*, 400 U.S. 920 (1970).

1657. 711 F.2d 1441 (9th Cir. 1983).

1658. 21 U.S.C. § 841(a)(1) (1976) provides: "[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

21 U.S.C. § 846 (1976) provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

1659. Another ground for the appeal was the claim of government misconduct. For a discussion, see *infra* notes 1769-73 and accompanying text.

place.¹⁶⁶⁰ The defendants claimed that the language in the indictment was open-ended concerning the time frame of the alleged illegal activity.¹⁶⁶¹ The court disagreed, stating that the term "on or about" is sufficiently specific and does not denote an indefinite time frame. Thus, the court concluded that the indictment was sufficient.¹⁶⁶²

In *United States v. Bennett*,¹⁶⁶³ the defendant was found guilty of one count of conspiracy, forty-nine counts of making false statements to the United States Department of Labor, seven counts of theft and embezzlement of CETA funds, and two counts of filing false income tax returns.¹⁶⁶⁴ In his appeal, Bennett claimed that the indictment was "multiplicitous" in that it charged him for the same offense in several separate counts.¹⁶⁶⁵ Before addressing this specific issue, the court first concluded that despite the similarities between the two statutes involved in this case,¹⁶⁶⁶ they met the "Blockburger" test for separate charges,¹⁶⁶⁷ and therefore did not violate Bennett's protective right

1660. The count alleged that "the conspiracy continued 'from on or about June 17, 1981, to on or about October 10, 1981.'" 711 F.2d at 1450.

1661. *Id.* The defendants were relying on the Ninth Circuit's decision in *United States v. Cecil*, 608 F.2d 1294, 1297 (9th Cir. 1979), where the language that the court held insufficient concerning the time a conspiracy took place read "beginning on or before" and "continuing thereafter until on or after." The court found that this language was "open-ended in both directions" and therefore "obscure." *Id.*

1662. 711 F.2d at 1450-51.

1663. 702 F.2d 833 (9th Cir. 1983).

1664. 18 U.S.C. § 371 (1976); 18 U.S.C. § 1001 (1976); 18 U.S.C. § 665(a) (1976); and 26 U.S.C. § 7206(1) (1976), respectively.

1665. Specifically, Bennett charged that counts 2-45 concerning submitting certain misleading invoices and counts 46-50 concerning submitted close-out reports which summarized the misleading invoices were the same offense.

1666. 18 U.S.C. § 665(a) (1976) provides in pertinent part:

(a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with any agency or organization receiving financial assistance or any funds under the Comprehensive Employment and Training Act . . . knowingly . . . obtains by fraud any of the moneys . . . or property which are the subject of a financial assistance agreement . . . shall be fined . . . or imprisoned . . . or both.

18 U.S.C. § 1001 (1976) provides in pertinent part:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies . . . by any trick, scheme, or device a material fact . . . or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined . . . or imprisoned . . . or both.

1667. 702 F.2d at 835. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932). The Ninth Circuit noted that the Supreme Court determined that "[t]he double jeopardy clause is not violated where separate charges are based on statutes, each of which requires proof of a fact the other does not." 702 F.2d at 835. According to this court, "the *Blockburger* test is met 'notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Id.* (quoting *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975)). *See, e.g., United States v. Anderson*, 642 F.2d 281 (9th Cir. 1981) (count charging conspiracy to distribute and possess

against double jeopardy. Thus, the court easily dismissed this argument on the basis of its previous ruling that each false document made or submitted may be charged as a separate violation.¹⁶⁶⁸ Since the counts charged separate offenses under this rule, the court concluded that they were not multiplicitous.¹⁶⁶⁹

Another case in which the court dealt with the claim that the language of the indictment was multiplicitous was *Baumann v. United States*.¹⁶⁷⁰ Baumann was charged and convicted of mail fraud and of aiding and abetting.¹⁶⁷¹ One of his contentions on appeal was that the indictment under which he was charged was invalid because it was improperly drawn due to the multiplicity and duplicity of the charges.¹⁶⁷² The Ninth Circuit first stated that a showing of "cause", such as ineffective assistance of counsel, was necessary to raise a collateral attack on the validity of an indictment.¹⁶⁷³ However, the court noted a further limitation by stating that relief will only be granted if, because of counsel's specific acts and omissions at trial, the defendant is prejudiced.¹⁶⁷⁴ The court concluded that Baumann could not be prejudiced by his counsel's failure to move for dismissal of any of the counts of the indictment because the district court had already concluded that they were not defective as a matter of law.¹⁶⁷⁵ Since the failure to raise a meritless legal argument does not constitute ineffective assistance of

heroin and count charging income tax evasion was not improper where evidence on both counts overlapped).

1668. 702 F.2d at 835. See *United States v. UCO Oil Co.*, 546 F.2d 833, 838-39 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977).

1669. 702 F.2d at 835.

1670. 692 F.2d 565 (9th Cir. 1982).

1671. 18 U.S.C. §§ 1341 & 1342. For text of U.S.C. § 1341, see *supra* note 1619.

18 U.S.C. § 1342 (1976) provides in pertinent part: "Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title . . . shall be fined . . . or imprisoned . . . or both."

Baumann's conviction was affirmed by the Ninth Circuit on direct appeal. More than two years later, Baumann petitioned the district court for post-conviction relief. See 28 U.S.C. § 2225 (1976). On referral, the magistrate recommended that the petition be dismissed because that section does not permit the relitigation of issues that have been or may be raised on direct appeal. 692 F.2d at 569. The district court ordered the petition dismissed. Baumann then appealed to the Ninth Circuit. *Id.*

1672. The district court ruled on the merits of the multiplicity claim by rejecting it because each of the four counts charged Baumann with a separate violation of the mail fraud statute. The district court also rejected the claim of duplicity because early in the trial it was stipulated that he was not charged with a substantive offense under the first count but rather that the references to Count 1 only incorporated the factual allegations of that count. 692 F.2d at 571.

1673. In his appeal, Baumann alleged ineffective assistance of counsel. *Id.* at 572.

1674. *Id.*

1675. See *supra* note 1672.

counsel, the court determined that there was not sufficient cause to attack the indictment collaterally.¹⁶⁷⁶

In *United States v. Brooklier*,¹⁶⁷⁷ one of the defendant's contentions was that the first count of the indictment concerning violations of the Racketeer Influenced and Corrupt Organizations (RICO) statute was ambiguous.¹⁶⁷⁸ The Ninth Circuit reasoned, however, that conspiracies and attempts may be considered as the underlying racketeering activities in light of the statutory definition of "racketeering activity."¹⁶⁷⁹ Thus, the court did not consider the count to be ambiguous.¹⁶⁸⁰

In *United States v. Ramirez*,¹⁶⁸¹ the defendants were convicted of conspiring to transport stolen aircraft, and of importing, possessing and distributing marijuana. One defendant argued that the signature phrase "true bill," the names and signatures of the grand jury foreperson and the United States Attorney, and the introductory phrase "the Grand Jury charges," on the indictment made it evident to the jury that a higher jury had already found the facts in the indictment to be true and the United States Attorney to have concurred. Thus, this defendant contended that this information was prejudicial to him. The Ninth Circuit, however, found this contention to be frivolous because the jury was properly instructed that the indictment was neither evidence against the defendant nor an inference of the defendant's guilt or innocence.¹⁶⁸²

1676. The court further concluded that it was not error for the district court to dismiss this appeal without ordering an evidentiary hearing, as the defendant's allegations failed to state a claim for relief. 692 F.2d at 572.

1677. 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1194 (1983).

1678. 18 U.S.C. § 1962 (c), (d) (1976) provide:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

The defendants asserted that the racketeering activities "include conspiracy charges, and that a 'conspiracy to conspire' to commit acts of extortion is an illogical and ambiguous allegation." 686 F.2d at 1216.

1679. The court stated that a series of conspiracies or unsuccessful attempts constitutes "a pattern of racketeering activity" within 18 U.S.C. § 1961(5), even if no offense is completed. 685 F.2d at 1216.

1680. *Id.* The court also noted that the defendants failed to make a showing that the alleged ambiguity was prejudicial to them. *Id.*

1681. 710 F.2d 535 (9th Cir. 1983).

1682. *Id.* at 545. Prior to reaching this conclusion, the court noted that the purpose of Fed. R. Civ. P. at 7(d), which allows language to be stricken from an indictment, is to protect a

2. Variance

"A variance arises when evidence adduced at trial establishes facts different from those alleged in the indictment."¹⁶⁸³ Variance is not usually considered to be reversible error when it arises from a simple clerical error or redundancy, or if it does not impair a defendant's right to receive notice of the charges, or does not impair his or her right against double jeopardy.¹⁶⁸⁴ However, it will be considered per se reversible error if the variance is found to either broaden or substantially alter the essential elements of the offense charged.¹⁶⁸⁵

The Ninth Circuit found reversible error in *United States v. Pazsint*,¹⁶⁸⁶ a case dealing with a variance between the charges of the indictment and the proof offered for conviction. The indictment charged the defendant with impeding, intimidating, and interfering with an Internal Revenue Service officer by use of a deadly or dangerous weapon.¹⁶⁸⁷ However, Pazsint's conviction was based on the forcible assault of a federal officer with the use of a deadly or dangerous weapon.¹⁶⁸⁸ One basis for Pazsint's appeal was that he was convicted of an offense not charged in the indictment.

The caption of the indictment returned by the grand jury stated "*Assault on a Federal Officer, Violation of 18 U.S.C. § 111.*"¹⁶⁸⁹ However, the body of the indictment did not mention the offense of assault.¹⁶⁹⁰ The Ninth Circuit observed that the caption to an indictment

defendant against prejudicial or inflammatory allegations which are not relevant or material to the charges. *Id.* at 544-45. See *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979) (language concerning prior felony conviction of carrying a handgun was prejudicial in an indictment charging possession of a firearm by a previously convicted felon); *United States v. Wilkerson*, 456 F.2d 57, 59 (6th Cir. 1972) (aliases struck from indictment where not relevant to the issue of defendant's identification), *cert. denied*, 408 U.S. 926 (1972).

1683. *Dunn v. United States*, 442 U.S. 100, 105 (1979) (citing *Berger v. United States*, 295 U.S. 78 (1935)).

1684. *United States v. Lyman*, 592 F.2d 496, 500-01 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979).

1685. *Stirone v. United States*, 361 U.S. 212, 215-17 (1960).

1686. 703 F.2d 420 (9th Cir. 1983).

1687. 18 U.S.C. § 111 (1976) prescribes the penalty for forcible assault, resistance, impudence, intimidation, or interference with any person designated in 18 U.S.C. § 1114 (1976 & Supp. III 1979).

1688. 18 U.S.C. § 111 (1976).

1689. 703 F.2d at 422-23 (emphasis added).

1690. Rather, the body of the indictment read: "[defendant] did unlawfully and wilfully, by use of a deadly or dangerous weapon, forcibly impede, intimidate and interfere with an officer of the Internal Revenue Service . . . in violation of Title 18, United States Code, Section 111." *Id.* at 423.

is not controlling and is complete surplusage.¹⁶⁹¹ The court also noted that because the statutory citation is not regarded as part of the indictment, the statement that the defendant violated 18 U.S.C. section 111 does not imply that he is charged with all the unlawful acts listed in the statute.¹⁶⁹²

The court concluded that because the jury instructions and possible verdict forms used only dealt with the uncharged crime of assault, the jury could not have found the defendant guilty of any other offense, including those mentioned in the indictment. Since the defendant was convicted of an offense that was not charged in the indictment, the court found it to be reversible error.¹⁶⁹³

In *United States v. Kendrick*,¹⁶⁹⁴ the defendant was convicted of securities law violations and perjury.¹⁶⁹⁵ Included in his appeal was the claim that there was a variance between the charge of the indictment and what was found by the jury.¹⁶⁹⁶

The Ninth Circuit dealt summarily with this claim. The charge of the indictment was that Kendrick knowingly converted money belonging to one of his victims to his own use, but the proof was that the alleged conversion was to the use of the business Kendrick & Company. The court dismissed this argument, finding that the jury could have concluded that because there was evidence that on the same day, the same amount of money was transferred from the Kendrick & Company account to the defendant's personal bank account, Kendrick could have used the money when purchasing stock for his own account.¹⁶⁹⁷ The court concluded that either way, the withdrawal was to Kendrick's benefit, and that even if there was some slight variance,

1691. *Id.* (citing *United States v. Dawson*, 516 F.2d 796, 804 (9th Cir.), *cert. denied*, 423 U.S. 855 (1975)).

1692. *Id.* (citing *United States v. Clark*, 416 F.2d 63, 64 (9th Cir. 1969)).

1693. *Id.* at 424. "In federal court a defendant may not be convicted of an offense different from that specifically charged by the grand jury." *Id.* at 423 (quoting *United States v. Stewart Clinical Laboratory, Inc.*, 652 F.2d 804, 807 (9th Cir. 1981) (although court may not amend indictment through jury instructions, correction of clerical error may constitute harmless error)).

1694. 692 F.2d 1262 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1892 (1983).

1695. The principal issue before the court was "whether the actions taken by [the defendant] in connection with margin accounts of two of his customers were taken 'in connection with the purchase or sale' of securities in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Securities and Exchange Commission (SEC) Rule 10b-5, 17 C.F.R. § 240.10b-5." *Id.* at 1264 (footnote omitted).

1696. Defendant also claimed that the indictment should be dismissed for pre-indictment delay. *Id.* at 1267. See *infra* notes 1750-52 and accompanying text.

1697. 692 F.2d at 1266.

there was no prejudice of a substantial right of the defendant.¹⁶⁹⁸

In *United States v. Goodheim*,¹⁶⁹⁹ the defendant was charged with and convicted of making false statements in connection with the acquisition of, receipt of, and possession of, a firearm by a convicted felon.¹⁷⁰⁰ On appeal, he claimed that the government failed to prove the existence of an *operable* firearm, as alleged in the indictment.¹⁷⁰¹

In response, the Ninth Circuit reviewed the statutory language of the allegedly violated sections¹⁷⁰² for the proper definition of "firearm." It concluded that neither definition required that the weapon be operable.¹⁷⁰³ Additionally, it noted that the defendant had stipulated at trial that each of the weapons was a firearm as defined in those sections. The court finally observed that although the government did not appear to undertake to define "firearm" as an operable weapon, a witness who was a firearms dealer testified that he had test-fired all three weapons. The court concluded that this testimony was sufficient to establish "operability" and that Goodheim's argument of variance was without merit.¹⁷⁰⁴

3. Competency and legality of evidence

"[T]he validity of an indictment is not [normally] affected by the character of evidence considered by the grand jury."¹⁷⁰⁵ An indictment, valid on its face and returned by a legally constituted and unbiased grand jury, is presumed to be founded upon sufficient evidence.¹⁷⁰⁶ A heavy burden is placed on the challenger.¹⁷⁰⁷ Thus, the Ninth Circuit has upheld indictments founded on hearsay evidence, or testimony of a

1698. *Id.* See *United States v. Phillips*, 577 F.2d 495, 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

1699. 686 F.2d 776 (9th Cir. 1982).

1700. 18 U.S.C. § 922(h)(1) (1976) provides: "It shall be unlawful for any person . . . who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

1701. 686 F.2d at 778.

1702. The court reviewed 18 U.S.C. § 921(a)(3) (1976), which defines "firearm" for the purposes of § 922(h)(1), and 18 U.S.C. § 1202(c)(3) (1976), which defines "firearm" for the purposes of § 20(a)(1). 686 F.2d at 778 n.1. 18 U.S.C. app. § 1202(c)(3) (1976) provides: "'firearm' means any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive Such term shall include any handgun, rifle, or shotgun."

1703. 686 F.2d at 778.

1704. *Id.*

1705. *United States v. Calandra*, 414 U.S. 338, 344-45 (1974).

1706. *United States v. Prescott*, 581 F.2d 1343, 1347 (9th Cir. 1978).

1707. *Id.*

single witness when other witnesses are available.¹⁷⁰⁸

Although an indictment usually cannot be attacked on the grounds of improper evidence, the Ninth Circuit has recently considered cases where the indictment has been attacked on the basis of incompetent evidence. In *United States v. DeLuca*,¹⁷⁰⁹ the defendants were convicted of conspiracy and racketeering.¹⁷¹⁰ On appeal, one defendant contended that the indictment should be dismissed because much of the evidence before the grand jury was either hearsay or incomplete. Previously, the Ninth Circuit had determined that to dismiss the indictment on the basis of inadequate evidence before the grand jury, it must be found that the grand jury failed to exercise its independent judgment.¹⁷¹¹ Absent a showing that the "government flagrantly manipulated, overreached, or deceived the jury," the court will not dismiss an indictment valid on its face.¹⁷¹² The court in this case found neither such a showing nor any suggestion that the grand jury failed to exercise its independent judgment.¹⁷¹³ Therefore, it upheld the indictment.

The Ninth Circuit also reviewed the sufficiency of evidence in *United States v. Gibson*,¹⁷¹⁴ where the defendant was convicted of mail fraud, wire fraud and inducing persons to travel in interstate commerce for purposes of fraud.¹⁷¹⁵ On appeal, Gibson claimed that the use of corporate checks written against insufficient funds as evidence was improper.¹⁷¹⁶ The court found that such evidence was relevant because it

1708. *United States v. Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), *cert. denied*, 103 S. Ct. 2097 (1983). *See, e.g.*, *Costello v. United States*, 350 U.S. 359 (1956) (indictment based entirely on hearsay evidence from investigating officers upheld).

1709. 692 F.2d 1277 (9th Cir. 1982).

1710. In addition, some of the defendants were convicted of extortion, 18 U.S.C. § 844, use of an explosive, 18 U.S.C. § 844(i), and arson. 692 F.2d at 1280.

1711. 692 F.2d at 1280 (citing *United States v. Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981) (presumption that grand jury bases its decision on its independent judgment)).

1712. *Id.* (citing *United States v. Stone*, 633 F.2d 1272, 1274 (9th Cir. 1979) (dismissal of indictment required only where grand jury has been flagrantly overreached or deceived in some significant way)).

1713. In its review of the claim, the court noted its previous criticism of the use of hearsay evidence where more reliable evidence is available. *See, e.g.*, *United States v. Samango*, 607 F.2d 877, 882 n.7 (9th Cir. 1979) (indictment upheld against claim of incompetent evidence before grand jury). However, it also recognized that such evidence is considered "wholly adequate to support an indictment." 692 F.2d at 1280 (citing *United States v. Garner*, 663 F.2d 834, 840 (9th Cir. 1981) (presentation of complete transcripts of sworn testimony rather than live witnesses is sufficient evidence for indictment), *cert. denied*, 456 U.S. 905 (1982)). *See also* *United States v. Al Mudarris*, 695 F.2d 1182 (9th Cir.) (indictment may be based solely on hearsay evidence), *cert. denied*, 103 S. Ct. 2097 (1983).

1714. 690 F.2d 697 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1446 (1983).

1715. 18 U.S.C. §§ 1341, 1343, and 2314 (1976), respectively.

1716. Gibson was president and chairman of the board of Gibson Marketing International, Inc. (GMI) and also held all of its capital stock. The purpose of the business was to

had a tendency to show both thin capitalization of Gibson Marketing International, Inc. (GMI) and Gibson's intent to deceive GMI investors. Thus, it concluded that the evidence was admissible since it related to the fraud charges in the indictment.¹⁷¹⁷

In *United States v. Fierros*,¹⁷¹⁸ the defendants were indicted for and convicted of conspiring to harbor and transport illegal aliens.¹⁷¹⁹ One defendant, Perez, included in his appeal a request for dismissal of the indictment, claiming that his due process rights were violated when the magistrate ordered seventeen aliens arrested in connection with the case released without Perez's stipulation.¹⁷²⁰ The district court, when reviewing Perez's motion to dismiss, concluded that the magistrate did not abuse his discretion because Perez did not attempt to show that the aliens' testimony could be of conceivable benefit to him.¹⁷²¹

However, the Ninth Circuit noted that the United States Supreme Court recently rejected the "conceivable benefit test" in *United States v. Valenzuela-Bernal*,¹⁷²² and accordingly held that unless Perez showed that the released witnesses' testimony would have been both "material and favorable to his defense," the indictment would not require dismissal.¹⁷²³ The court then noted that Perez did not endeavor to explain what favorable material evidence the released witnesses would have provided for his defense and the court could not determine what, if any, evidence those witnesses could have supplied which might have

sell franchises and franchise distributorship rights to certain fast food restaurants. However, it was found that "GMI did not provide certain of the promised business services." 690 F.2d at 699.

1717. *Id.* at 703. In making his claim, Gibson relied on the Sixth Circuit's decision in *United States v. McFayden-Snyder*, 552 F.2d 1178 (6th Cir. 1977) (excluding bad check evidence unrelated to the fraud charged in the indictment), *cert. denied*, 435 U.S. 995 (1978). However, the Ninth Circuit found Gibson's reliance misplaced as *McFayden-Snyder* did approve admission of bad check evidence when it is related to the fraud charged in the indictment, as in the instant case. 690 F.2d at 703.

1718. 692 F.2d 1291 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3090 (1983).

1719. 18 U.S.C. § 371 (1976) and 8 U.S.C. § 1324(a) (1976), respectively.

1720. The seventeen aliens were riding on the bus going to work when they were arrested at the time Perez was arrested. Perez claimed that they would have been witnesses in his defense. 692 F.2d at 1296.

1721. *Id.* (citing *United States v. Martinez-Morales*, 632 F.2d 112, 114-15 (9th Cir. 1980) (no constitutional principles offended when government releases witness when government not aware of possible connection with other crimes); *United States v. Carrillo-Frausto*, 500 F.2d 234, 235-36 (9th Cir. 1974) (when facts show that retention of material witness would be inappropriate or undesirable, court has power to release)).

1722. 458 U.S. 858, 871-73 (1982) (indictment can be dismissed on showing that government deliberately procured absence of witness favorable to defense).

1723. 692 F.2d at 1296 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)).

aided his defense.¹⁷²⁴ Therefore, the court concluded that the district court did not err in denying his motion to dismiss the indictment.¹⁷²⁵

4. Pre-indictment delay

If an indictment is not filed within the statutory time limit, a presumption may arise that the defendant's right to a fair trial has been prejudiced.¹⁷²⁶ In *United States v. Carruth*,¹⁷²⁷ the defendants were convicted of conspiring to defraud the United States by tax fraud in connection with the operation of limited partnership tax shelter schemes.¹⁷²⁸ The defendants appealed their convictions on the basis that pre-indictment delay had prejudiced their defense, thereby denying their right to due process of law.¹⁷²⁹

When considering whether pre-indictment delay requires dismissal, it must first be determined whether the defendant has suffered actual prejudice because of the delay.¹⁷³⁰ The defendant bears the burden of establishing such actual prejudice using "definite, not speculative" proof.¹⁷³¹ If the defendant is able to show actual prejudice, the court will then consider the reasons for and length of the delay.¹⁷³²

The defendant, Carruth, attempting to show actual prejudice, contended that during the delay periods he had destroyed many of his personal and business records. Moreover, his accountant had died shortly before the indictment was issued, and thus could not testify on his behalf. Both the district court and the Ninth Circuit agreed that these contentions did not amount to actual prejudice.¹⁷³³ The court noted that the defendant failed to establish that either the records or the ac-

1724. *Id.* The court further noted that there was sufficient evidence of other acts performed by Perez on different occasions to support his conviction.

1725. *Id.*

1726. *United States v. Marion*, 404 U.S. 307 (1971).

1727. 699 F.2d 1017 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 698 (1984).

1728. 18 U.S.C. § 371 (1976) provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . or both.

1729. 699 F.2d at 1019.

1730. *Id.* (citing *United States v. Swacker*, 628 F.2d 1250, 1254 (9th Cir. 1980) (court must find that actual prejudice due to pre-indictment delay has been suffered by defendant before it can dismiss indictment)).

1731. *Id.* (citing *United States v. Mills*, 641 F.2d 785, 788 (9th Cir.) (mere assertions of actual prejudice considered speculative without additional proof of actual prejudice), *cert. denied*, 454 U.S. 902 (1981)).

1732. *Id.* See *infra* note 1742 for further discussion of Ninth Circuit's balancing test for pre-indictment delay.

1733. 699 F.2d at 1019.

countant's testimony would have exonerated him.¹⁷³⁴ The court refused to grant a person under criminal investigation the right to destroy his records and then plead prejudice because those records are unavailable to support the defense.¹⁷³⁵

The second defendant also pleaded actual prejudice because, although microfilm copies of his business records were available, he had destroyed the "hard copies."¹⁷³⁶ The court decided that since the microfilmed copies were available, the defendant was not prejudiced in his preparation for trial.¹⁷³⁷

The court concluded that since there was no finding of actual prejudice against either defendant, it was not necessary to balance the prejudice suffered by the defendants against the reasons for and length of the pre-indictment delay.¹⁷³⁸ The court also added that due to the difficulty of unraveling the defendants' schemes, the three year delay from the beginning of the criminal investigation to the return of the indictment was not inordinate.¹⁷³⁹

The Ninth Circuit also denied making a finding of pre-indictment delay in *United States v. Tornabene*.¹⁷⁴⁰ The defendant Tornabene sold LSD to Drug Enforcement Administration (DEA) agents in November, 1978, but was not indicted until June, 1980, eighteen months later. The Ninth Circuit, in reaching its decision, applied the three balancing factors from *United States v. Mays*¹⁷⁴¹ for establishing the proper standard for dismissal due to pre-indictment delay. Those factors are: (1) actual prejudice to the defendant, to be proved by the defendant, (2) length of delay, and (3) the government's reason for the delay.¹⁷⁴²

1734. The government's case was founded on the assumption that defendants created documentation for nonexistent transactions, but Carruth failed to show that the destroyed documents would have proved that the transactions actually existed. *Id.*

1735. *Id.*

1736. The defendant Reed claimed that he destroyed his records in reasonable reliance on Tax Division letters. However, the court noted that the Tax Division responded to Reed's letter requesting information about why his records were transferred to the IRS as a request for an interpretation of their reference code number system. *Id.* at 1020.

1737. *Id.* The court also noted that in Reed's case, the documents were destroyed because of his "mistaken interpretation" of the Tax Division letters, and not because of the delay in bringing the indictment. *Id.*

1738. *Id.* (citing *United States v. Mills*, 641 F.2d 785, 789 (9th Cir. 1981)).

1739. *Id.* Cf. *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977) (no due process violation from four and one-half year delay).

1740. 687 F.2d 312 (9th Cir. 1982).

1741. 549 F.2d 670 (9th Cir. 1977).

1742. 687 F.2d at 316-17. The Ninth Circuit developed this balancing test despite the Supreme Court's ruling in *United States v. Lovasco*, 431 U.S. 783 (1977), that dismissal of an indictment is necessary when the delay causes substantial prejudice to a defendant's right to a fair trial and is intentionally used to gain a tactical advantage over the defendant. *Id.* at

The government argued that during the interim period, it was unsuccessfully attempting to arrange further LSD sales by Tornabene to government agents. The court concluded that the "on-going investigation" was a legitimate reason for the delay.¹⁷⁴³ However, without any discussion concerning Tornabene's proof of prejudice, the court determined that the trial court's decision was not clearly erroneous and therefore affirmed it.¹⁷⁴⁴

In *United States v. Burns*,¹⁷⁴⁵ the defendant, an Indian, was charged and convicted of two robberies in Indian territory,¹⁷⁴⁶ possession of a firearm,¹⁷⁴⁷ and use of a firearm in the commission of a felony.¹⁷⁴⁸ The defendant was not indicted for over a year after the perpetration of the crimes and thus claimed that pre-indictment delay violated his due process rights. Although the court found that the defendant alleged actual prejudice, it noted that he failed to show how he was prejudiced by the delay, or that the prosecution either intentionally or recklessly delayed the indictment.¹⁷⁴⁹ Thus, the court easily dismissed his claim that his due process rights had been violated.

Another case in which the Ninth Circuit reviewed a claim of pre-indictment delay was *United States v. Kendrick*.¹⁷⁵⁰ Kendrick argued that his conviction for securities law violations and perjury should be reversed because during the delay period, documents were lost and one witness may have forgotten certain details. The Ninth Circuit first

790, 795 (citing *United States v. Marion*, 404 U.S. 307, 324-25 (1971) (indictment upheld despite finding of actual prejudice because government's reason for delay found valid)).

1743. In other words, there was not an intentional or negligent delay for improper purposes. 687 F.2d at 317.

1744. *Id.* Tornabene also claimed that the indictment should be dismissed because the government failed to produce the informant as was requested by him in support of his entrapment defense. *Id.* at 316 (citing *Roviaro v. United States*, 353 U.S. 53, 65, n.15 (1957)). Tornabene argued that such failure was "tantamount to failure to identify the informant." *Id.* The court disagreed, stating that the proper remedy for such failure is a new trial and thus, reversed and remanded this issue to the district court. *Id.*

1745. 701 F.2d 840 (9th Cir.), *cert. denied*, 103 S. Ct. 3123 (1983).

1746. 18 U.S.C. §§ 2, 1153 & 2111 (1976).

1747. 18 U.S.C. app. § 1202(a)(1) (1976).

1748. 18 U.S.C. § 924(c) (1976).

1749. 701 F.2d at 842. *See United States v. Lovasco*, 431 U.S. 783, 789-90 (1977) (defendant must show that the delay caused him actual prejudice). The court noted that the defendant must also show that the "prosecution either intentionally delayed the indictment to gain a tactical advantage or delayed it in reckless disregard of circumstances indicating an appreciable risk of harm to the defense." 701 F.2d at 842 (citing *Lovasco*, 431 U.S. at 795 & n.17, 796). *See also United States v. Walker*, 601 F.2d 1051, 1056 (9th Cir. 1979) (pre-indictment delay permissible unless it violates fundamental concepts of justice).

1750. 692 F.2d 1262 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1892 (1983). For a more detailed discussion of the facts of this case, see *supra* notes 1694-98 and accompanying text.

noted that proof of prejudice is necessary to a claim of pre-indictment delay.¹⁷⁵¹ However, the court found that the defendant, in trying to prove prejudice, only showed "speculation" as to what the witness may have forgotten and what certain allegedly missing documents may have revealed. The court did not find this sufficient.¹⁷⁵²

In *United States v. Greene*,¹⁷⁵³ the defendant was charged with willfully attempting to evade federal income taxes,¹⁷⁵⁴ and was convicted when the jury found that he had understated his taxable income for the years 1973 and 1974. Included in his appeal was the contention that the charge of evasion in 1973 was time barred.¹⁷⁵⁵ However, the government was able to show that because of the suspended time period due to third party enforcement proceedings, the indictment was brought within four days of the expiration of the limitation period.¹⁷⁵⁶ The defendant countered this showing by contending that the suspension of the limitation period should not have been allowed after he withdrew his objection to the third party summons, and in addition, should not be applied where a taxpayer is not exercising his right to stay compliance under Title 26, section 7609(b)(2), of the United States Code.¹⁷⁵⁷

The Ninth Circuit determined that Congress intended that a stay under section 7609(b)(2) remain in effect until a *written* withdrawal of objection is received by the Internal Revenue Service and the person

1751. 692 F.2d at 1267 (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

1752. *Id.* (citing *United States v. Mills*, 641 F.2d 785, 788-89 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981); *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977)).

1753. 698 F.2d 1364 (9th Cir. 1983).

1754. 26 U.S.C. § 7201 (1976).

1755. 698 F.2d at 1367-68. 26 U.S.C. § 6531 (1976) provides that an indictment for tax evasion must be returned within six years after the commission of the offense. However, the court noted that where third party enforcement proceedings under 26 U.S.C. § 7609(e) are necessary, it operates to suspend the limitations period. 698 F.2d at 1369 n.4.

1756. 698 F.2d at 1369. The indictment was not returned until over six years after the alleged tax year offense.

1757. *Id.* 26 U.S.C. § 7609(b)(2) (1976) provides in pertinent part:

[a]ny person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if . . .

(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice . . . is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice.

Section 7609(e) provides in pertinent part:

If any person takes any action as provided in subsection (b) . . . then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding . . . with respect to the enforcement of such summons is pending.

summoned.¹⁷⁵⁸ The court determined that since no written withdrawal was ever received by the trustee in bankruptcy, the defendant was still exercising his right to stay compliance. Thus, the court concluded that since the limitation period was properly suspended, the indictment was timely.¹⁷⁵⁹

5. Dismissal due to government misconduct

Prejudicial government misconduct which results in an intrusion into the defendant's constitutional rights is another basis for dismissal of the indictment.¹⁷⁶⁰ In *United States v. Ramirez*,¹⁷⁶¹ one defendant contended that the indictment against him should be dismissed as a result of police misconduct.¹⁷⁶² Defendant Reynolds was an informant for the Los Angeles Police Department (LAPD). However, because of his prior suspicious actions, the LAPD considered him a double agent and therefore untrustworthy. During the time of the criminal activities in this case, the defendant contacted the LAPD and informed them of impending meetings in which he was participating.

The court noted that there was some support to be found in Reynolds' allegations that he was illegally bribed and coerced into working as an informant and that the police intentionally misled him while still intending to arrest him. However, the court was convinced by the government's argument that the LAPD's actions were permissible in light of Reynolds' previous untrustworthy actions and the LAPD's suspicion that he was a double agent.¹⁷⁶³ The court agreed with the government that the police actions were within permissible limits.¹⁷⁶⁴

The Ninth Circuit also found that the district court did not abuse its discretion in refusing to dismiss the indictment by not exercising its

1758. 698 F.2d at 1369-70. The court noted that Congress has not explicitly stated how a defendant may withdraw or revoke his previously exercised objection under § 7609(b), but has concluded that since written notice is required to stay compliance with a summons, it was reasonable to infer that written notice is required to withdraw the objection. *Id.*

1759. *Id.* at 1370.

1760. *United States v. Chanen*, 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

1761. 710 F.2d 535 (1983). For discussion of this case concerning "essential elements" of the indictment, see *supra* notes 1681-82 and accompanying text.

1762. In a pretrial motion, the defendant contended that the LAPD's actions violated his due process rights, or alternatively, that the misconduct justified the use of the supervisory power of the district court to either dismiss the indictment or take other remedial action. The outrageous police misconduct alleged by the defendant was that the police coerced Reynolds into acting as an informer and into playing an active role in the resulting criminal enterprise, and then prosecuted him for doing only what the police had instructed him to do. 710 F.2d at 539.

1763. *Id.* at 540-41.

1764. *Id.* at 541.

supervisory powers in this case.¹⁷⁶⁵ The court first noted that a dismissal should be granted only when there is a clear basis in fact and law for doing so,¹⁷⁶⁶ and that the power has been used only infrequently. The court then concluded that since it had already found that the police conduct was within permissible limits, the use of the court's supervisory power in this case would not further any of the purposes recognized by the United States Supreme Court.¹⁷⁶⁷ Thus, it affirmed the district court's decision not to dismiss the indictment.¹⁷⁶⁸

In *United States v. McCown*,¹⁷⁶⁹ the defendants claimed that their indictment should be dismissed due to government misconduct during the undercover investigation leading to their arrests. In response, the court stated that an indictment should only be dismissed "when the government's misconduct is 'so grossly shocking and so outrageous as to violate the universal sense of justice.'" ¹⁷⁷⁰

The defendants claimed that undercover government agents, without the permission of their superiors, distributed two samples of marijuana to the defendants without attempting to recover them and with little concern as to what was to become of the contraband.¹⁷⁷¹ After noting that only two federal appellate cases have responded to the "outrageous government misconduct" argument, the Ninth Circuit did not find the conduct in this case to be either "grossly shocking" or "outrageous."¹⁷⁷² Thus, the court found that the conduct of the government

1765. *Id.* Three listed purposes which may properly underlie use of the supervisory power are: "(1) to implement a remedy for violation of recognized rights; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and (3) as a remedial measure designed to deter illegal conduct." *Id.* (citing *United States v. Hasting*, 103 S. Ct. 1974, 1978 (1983)).

1766. *Id.* (citing *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977)).

1767. *See supra* note 1765.

1768. 710 F.2d at 549.

1769. 711 F.2d 1441 (9th Cir. 1983). For further discussion of the claims of defendants in this case, see *supra* notes 1657-62 and accompanying text.

1770. 711 F.2d at 1449 (quoting *United States v. Bagnariol*, 665 F.2d 877, 883 (9th Cir. 1981) (*per curiam*)).

1771. *Id.* The undercover agents distributed two samples of marijuana, one of which contained six ounces and the other contained two to five ounces. The defendants claimed that the agents did not have permission to distribute the second sample. *Id.*

1772. *Id.* at 1449-50. The two federal appellate cases upholding the government misconduct argument are *United States v. Twigg*, 588 F.2d 373, 380-81 (3d Cir. 1978) and *Greene v. United States*, 454 F.2d 783, 786-87 (9th Cir. 1971). In both cases, it was found that the defendant "would have not had the capacity to commit the crimes with which they were charged without the government's assistance." 711 F.2d at 1449-50 (quoting *United States v. Lomas*, 706 F.2d 886, 891 (9th Cir. 1983)).

agents in this case did not warrant dismissal of the indictment.¹⁷⁷³

The defendants in *United States v. Al Mudarris*¹⁷⁷⁴ were indicted for mail fraud against a medical insurance carrier. The grand jury heard testimony, but before the indictment was returned, its term expired and a new grand jury heard a single summary witness¹⁷⁷⁵ before returning the indictment. In addition to claiming that the evidence was inadequate before the indicting grand jury,¹⁷⁷⁶ the defendants claimed that due to the cumulative effect of prosecutorial misconduct before the grand jury, the indictment should have been dismissed.¹⁷⁷⁷

In response, the Ninth Circuit noted that the party challenging the indictment has the difficult burden of showing that flagrant misconduct of the prosecutor deceived the grand jury or significantly impaired its ability to exercise independent judgment.¹⁷⁷⁸ The court concluded that the prosecutor's actions did not meet the flagrant misconduct standard and thus upheld the trial court's discretion in not dismissing the indictment.¹⁷⁷⁹

In *United States v. Everett*,¹⁷⁸⁰ the defendants were convicted of conspiring to impair, impede and obstruct the collection of tax revenue.¹⁷⁸¹ On appeal, defendant Chira claimed the district court erred in denying their motion to dismiss the indictment on the grounds of governmental misconduct. Chira claimed several inaccuracies in the presentation of his case, including misinformation in the affidavit of

1773. 711 F.2d at 1450. The court found the Supreme Court's statement in *Hampton v. United States*, 425 U.S. 484, 490 (1976) (plurality opinion), particularly apt:

If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.

711 F.2d at 1450.

1774. 695 F.2d 1182 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 2097 (1983).

1775. The single summary witness was an agent from the Bureau of Alcohol, Tobacco and Firearms. *Id.* at 1184.

1776. See *supra* notes 1705-25 and accompanying text for a general discussion of evidence before the grand jury.

1777. The defendants claimed that "the prosecutor and summary witness needlessly injected irrelevant subject matter that was highly prejudicial and sometimes misleading." 695 F.2d at 1186. They also claimed that the prosecutors "improperly influenced the grand jury and usurped its role by resolving credibility issues." *Id.* at 1187.

1778. *Id.* at 1185 (citing *United States v. Wright*, 667 F.2d 793, 796 (9th Cir. 1982) (erroneous grand jury instructions do not automatically invalidate an otherwise proper grand jury indictment)).

1779. The court noted that it may dismiss an indictment as an exercise of its inherent supervisory power to protect a defendant's due process rights. *Id.*

1780. 692 F.2d 596, 597 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1498 (1983) and *cert. denied*, 103 S. Ct. 1502 (1983).

1781. 18 U.S.C. § 371 (1976). See *supra* note 1728 for text of § 371.

probable cause submitted in support of the complaint, misidentification of him as "Joseph" rather than "Richard" on both the arrest warrant and complaint, and excessive and unnecessary use of hearsay testimony before the grand jury. However, the Ninth Circuit found that the alleged inaccuracies did not approach the level of government misconduct necessary to violate the due process clause or to justify an exercise of the supervisory power of the court.¹⁷⁸² The court stated that such supervisory power, including the power to dismiss an indictment on the basis of governmental or prosecutorial misconduct, will be used to dismiss an indictment only when the misconduct represents "a serious threat to the integrity of the judicial process."¹⁷⁸³ The court did not find that Chira's claims of misconduct rose to that level.

6. Dismissal due to selective prosecution

In *United States v. Butterworth*,¹⁷⁸⁴ the Ninth Circuit found it necessary to deny review based on its lack of jurisdiction over the appeal. The appeal concerned the defendants' claims that because they were on a government list of appropriate targets for prosecution, they were selectively prosecuted.¹⁷⁸⁵ Previously, the Ninth Circuit had allowed vindictive prosecution claims to be appealed immediately under the "collateral order exception to the final judgment rule,"¹⁷⁸⁶ and accordingly had also allowed selective prosecution claims to be immediately appealed because of the similarity of the two claims.¹⁷⁸⁷ However, the court stated that the Supreme Court had recently reversed a decision of the Ninth Circuit allowing an immediate appeal of a vindictive prosecution claim.¹⁷⁸⁸ Thus, the court, noting its previous recognition of the

1782. 692 F.2d at 601.

1783. *Id.* (citing *United States v. Samango*, 607 F.2d 877, 885 (9th Cir. 1979)).

1784. 693 F.2d 99 (9th Cir. 1982).

1785. *Id.* at 100. Appellants were air traffic controllers and were charged with knowingly participating in a strike against the United States in 1981. This was a violation of 18 U.S.C. § 1918(3) and 5 U.S.C. § 7311(3). The court stated that, "[s]elective prosecution occurs when the government, without prosecuting others for similar conduct, brings charges against a person on the basis of race, religion, or the exercise of constitutional rights." 693 F.2d at 101.

1786. 693 F.2d at 101. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949).

1787. Vindictive prosecution claims arise when the government increases the severity of charges against a defendant who has exercised a constitutional right. 693 F.2d at 101. The *Butterworth* court stated that "[t]he interests involved [in selective prosecution cases] are the same as in vindictive prosecution cases: the defendant seeks protection from criminal prosecution initiated punitively, in response to the exercise of his constitutional rights." *Id.* at 100-01 (quoting *United States v. Wilson*, 639 F.2d 500, 502 (9th Cir. 1981)).

1788. *Id.* at 101 (citing *United States v. Hollywood Motor Car Co.*, 646 F.2d 384 (9th Cir.

similarity between selective and vindictive prosecution claims, also disallowed this immediate appeal, finding that it did not have jurisdiction.

In *United States v. Christopher*,¹⁷⁸⁹ defendant Herer appealed his conviction claiming that the government selectively prosecuted him because he was a vocal leader of the organization whose goal was the passage of the California Marijuana Initiative.¹⁷⁹⁰ Other defendants also appealed claiming that they were impermissibly selected for prosecution due to their "petitioning activities" when other trespassers were not cited.¹⁷⁹¹

In reaching its decision, the Ninth Circuit affirmed its earlier decision that although mere selectivity in prosecution does not create a constitutional problem,¹⁷⁹² if there is unconstitutional discrimination when administering a criminal statute, a defendant cannot stand convicted.¹⁷⁹³ The impermissible selection must be shown to be based on an unjustifiable standard such as the exercise of the first amendment right of free speech.¹⁷⁹⁴ The court concluded that defendants failed to meet their burden of proof to overcome the presumption that the prosecution was undertaken in good faith and in a nondiscriminatory fashion.¹⁷⁹⁵ The court in so finding noted that the government advanced several plausible grounds for prosecution, including that those not prosecuted were not camping on the grounds but simply passing through, while those cited may have been responsible for leaving human waste on the grounds and creating concern over noise and se-

1981) (vindictive prosecution established when government threatened defendants with enhanced charges if defendants requested change of venue), *rev'd*, 458 U.S. 263 (1982), *on remand*, 682 F.2d 1352 (9th Cir. 1982)).

1789. 700 F.2d 1253 (9th Cir. 1983). For further discussion of this case concerning essential elements, see *supra* notes 1634-42 and accompanying text.

1790. 700 F.2d at 1258. In 1981, the defendants set up an information table on federal property in West Los Angeles, but refused to leave when asked to by Federal Protective Service officers. *Id.* at 1256.

1791. *Id.* at 1258.

1792. *Id.* (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

1793. *Id.* (citing *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972) (government may not purposefully discriminate against persons who exercise their first amendment rights)).

1794. *Id.* (citing *United States v. Choate*, 619 F.2d 21, 23 (9th Cir.) (indictment upheld where defendant claimed he was prosecuted because he was suspected of committing another offense), *cert. denied*, 449 U.S. 951 (1980); and *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975) (indictment upheld where defendant failed to show that government failed to prosecute others who were not vocal), *cert. denied*, 424 U.S. 955 (1976)).

1795. *Id.* (citing *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973) (en banc) (burden of proof switches to government when defendant alleges intentional, purposeful discrimination and facts supporting allegation raise reasonable doubt as to government's purpose for prosecution)).

curity.¹⁷⁹⁶ Thus, the Ninth Circuit could not find that the district court's findings were clearly erroneous.¹⁷⁹⁷

In *United States v. Greene*,¹⁷⁹⁸ the defendant was convicted for willfully attempting to evade federal income taxes for the years 1973 and 1974.¹⁷⁹⁹ The Ninth Circuit easily dismissed the defendant's contention that he was improperly selected for prosecution.¹⁸⁰⁰ The court concluded that the defendant failed to meet his burden of proving that the allegedly discriminatory prosecution was founded in an impermissible motive and that others in similar situations have not been prosecuted.¹⁸⁰¹ The court found that the agent's report was only relevant as to the impermissible motive.¹⁸⁰² In addition, the court concluded that the recommendation to prosecute was reviewed by two government divisions, and that the defendant's showing was "insufficient to taint the entire administrative process."¹⁸⁰³

7. Dismissal due to vindictive prosecution

In *United States v. Allen*,¹⁸⁰⁴ the defendant was convicted of possession of a firearm by a convicted felon.¹⁸⁰⁵ One of his contentions on appeal was that the district court erred in not dismissing the indictment for vindictive prosecution.¹⁸⁰⁶ Allen contended that the government's admission that the indictment was delayed because it was awaiting dis-

1796. *Id.*

1797. *Id.* The Ninth Circuit first developed the "clearly erroneous" standard in *United States v. Wilson*, 639 F.2d 500, 503 (9th Cir. 1981), when considering a motion to dismiss for selective prosecution.

1798. 698 F.2d 1364 (9th Cir. 1983).

1799. 26 U.S.C. § 7201 (1976). For discussion of this case concerning time limitations see *supra* notes 1753-59 and accompanying text.

1800. The defendant claimed he was selectively prosecuted since he was actively giving classes in "tax avoidance" and the revenue agent's report stated that his prosecution "may act as a deterrent to further attempts by other individuals to evade income taxes." 698 F.2d at 1368.

1801. *Id.* (citing *United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981)). In *Ness*, the Ninth Circuit determined that a defendant has the burden of showing "that others similarly situated have not been prosecuted and that the prosecution was based on an impermissible motive." *United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981).

1802. 698 F.2d at 1368. Greene claimed that the agent's report was inconsistent with the agent's declaration in which the agent stated that his recommendation to prosecute was based solely on his investigation showing that Greene had willfully failed to report a large amount of taxable income.

1803. *Id.* (citing *United States v. Erne*, 576 F.2d 212, 216-17 (9th Cir. 1978) (the ultimate decision to prosecute is several steps removed from the revenue officer)).

1804. 699 F.2d 453 (9th Cir. 1982).

1805. 18 U.S.C. app. § 1202(a) (1976).

1806. For a definition of "vindictive prosecution," see *supra* note 1787.

position of an unrelated criminal case in Oregon was an improper and vindictive justification for the delay and that he was, in effect, penalized for "seeking and obtaining favorable treatment" in the Oregon case.¹⁸⁰⁷

The Ninth Circuit noted that the Supreme Court recently limited the application of the presumption of vindictiveness to cases where "'a reasonable likelihood of vindictiveness exists.'" ¹⁸⁰⁸ It then concluded that the question before the court was whether the presumption of vindictiveness should be applied if the government bases its decision to prosecute on the severity of the sentence received by a defendant in an earlier unrelated prosecution.¹⁸⁰⁹

In reaching its decision, the court noted its earlier decision in *United States v. DeMarco*,¹⁸¹⁰ where the court dismissed an indictment after the defendant exercised his right to change venue and the government sought an additional indictment.¹⁸¹¹ The court distinguished *DeMarco*, in that in the present case they could not see an increased burden on the prosecutor by Allen's exercise of procedural rights during sentencing in Oregon.¹⁸¹² The court concluded that since it is expected that every defendant will seek favorable treatment at the time of sentencing, the corresponding burden on the government will also arise in every case. Accordingly, it would be unrealistic to assume that every time a defendant filed a routine motion, the prosecutor's response would be to penalize and to deter the defendant.¹⁸¹³ Thus, the court

1807. 699 F.2d at 460. There was more than one year between the execution of the search warrant and the return of the indictment.

1808. *Id.* (quoting *United States v. Goodwin*, 457 U.S. 368, 373 & n.2 (1982)). The Ninth Circuit noted further that a conviction in a case "'may be reversed only if a presumption of vindictiveness—applicable in all cases—is warranted.'" *Id.* (quoting *United States v. Goodwin*, 457 U.S. at 381 (emphasis in original)). The Supreme Court in *Goodwin*, however, made a cautionary note when it stated that, "[g]iven the severity of such a presumption, however,—which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct—the Court has [presumed vindictiveness] only in cases in which a reasonable likelihood of vindictiveness exists." *United States v. Goodwin*, 457 U.S. 368, 373 (1982).

1809. 699 F.2d at 460.

1810. 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977).

1811. The court dismissed the indictment due to "the apprehension of vindictiveness." *Id.* at 1227. In *Portillo*, the court noted that the prosecutor in *DeMarco* had "'considerable stake in discouraging' defendants from exercising their venue rights when the effect 'will clearly require increased expenditures of prosecutorial resources' because the prosecutor loses the advantage of trying alleged conspirators together and must also conduct two trials in different parts of the country." 699 F.2d at 461 (quoting *United States v. DeMarco*, 550 F.2d at 1227 (citations omitted)).

1812. 699 F.2d at 461.

1813. *Id.*

found that there was neither direct evidence nor a presumption of vindictiveness in this case. It concluded that the trial court did not abuse its discretion in not dismissing the indictment.¹⁸¹⁴

In *United States v. Brooklier*,¹⁸¹⁵ five defendants had been charged with racketeering in violation of the RICO Act,¹⁸¹⁶ violation of the Hobbs Act or extortion,¹⁸¹⁷ obstruction of justice,¹⁸¹⁸ and aiding and abetting.¹⁸¹⁹ Two of the defendants, Brooklier and Sciortino, made a number of arguments for the dismissal of the indictment.¹⁸²⁰ One of their contentions was that in light of the 1975 charges and resulting plea agreement, the current indictment violated the *Petite* doctrine against multiple prosecutions for the same transaction.¹⁸²¹ The Ninth Circuit rejected this contention because the doctrine is an internal policy of the Justice Department and thus not justiciable.¹⁸²²

Brooklier and Sciortino also contended that the inclusion in the current indictment of the extortion count represented vindictive prosecution. This particular extortion count had not previously been included in the 1978 indictment,¹⁸²³ but was added in the subsequent

1814. *Id.*

1815. 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1194 (1983).

1816. 18 U.S.C. § 1962 (1976). For text of § 1962, see *supra* note 1678.

1817. 18 U.S.C. § 1951 (1976) provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined . . . or imprisoned . . . or both.

1818. 18 U.S.C. § 1510 (1976) provides in pertinent part:

(a) Whoever willfully endeavors by means of bribery . . . to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined . . . or imprisoned . . . or both.

1819. 18 U.S.C. § 2 (1976) provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

1820. See *supra* notes 1677-80 and accompanying text.

1821. 685 F.2d at 1215. See *Petite v. United States*, 361 U.S. 529 (1960). "The *Petite* doctrine relates to the Justice Department's internal position that successive indictments will not ordinarily be based on the same conduct in order to avoid unnecessary multiple prosecutions." 685 F.2d at 1215. Generally, it is a nonjusticiable doctrine. *Id.* (citing *United States v. Snell*, 592 F.2d 1083, 1087-88 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979); *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.), *cert. denied*, 439 U.S. 842 (1978)).

1822. See *supra* note 1821.

1823. The 1978 indictment was dismissed because of voting irregularities in the grand jury. 685 F.2d at 1215.

indictments. The court concluded that since the 1980 indictment contained fewer charges and lighter penalties than the 1978 indictment, the vindictiveness doctrine did not apply.¹⁸²⁴ The court reasoned that if the circumstances are such that it is realistic or reasonable to assume that the government conduct would not have occurred but for the hostility or a punitive animus towards the defendant because he has exercised his legal rights, the doctrine will be applied.¹⁸²⁵ Thus, the court concluded that the district court correctly dismissed the vindictive prosecution claim.¹⁸²⁶

C. *Identifications*

The Ninth Circuit applies the test articulated in *Simmons v. United States*¹⁸²⁷ when considering a defendant's claim that identification procedures deprived him of due process. Convictions resulting from identifications will be set aside if the pretrial identification was "so impermissibly suggestive as to give rise to a substantial likelihood of

1824. *Id.* (citing *United States v. Rosales-Lopez*, 617 F.2d 1349, 1357 (9th Cir. 1980) (vindictiveness not found where charges in second indictment exposed defendant to no greater risk of punishment than those in first indictment)).

1825. *Id.* (citing *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1169 (9th Cir. 1982) (vindictive prosecution exists only when prosecutorial actions arise from an animus toward the exercise of defendant's rights)). The court also noted that vindictiveness could not be presumed in this case as the government having to obtain a new indictment would "'necessarily have to review the evidence and reconsider what charges to present to the grand jury.'" *Id.* at 1216 (quoting *United States v. Banks*, 682 F.2d 841, 845 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 755 (1983) (emphasis in original)). Because the prosecutor "'may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance,'" there is "'no reasonable likelihood'" that vindictiveness is present when the government increases the charges before trial. *Id.* at 1215 (quoting *United States v. Goodwin*, 457 U.S. 368 (1982)).

1826. *Id.* at 1216.

1827. 390 U.S. 377 (1968). In *Simmons*, eyewitnesses identified defendant Simmons from a photographic display the day after a bank robbery. The photographs had been obtained from a relative of the defendant and all featured him in the presence of others. *Id.* at 382. Simmons contended that the pretrial photographic identification procedure was so unnecessarily suggestive and conducive to misidentification as to deny him due process of law, or, at the very least, to require reversal of his conviction. *Id.* at 381.

The United States Supreme Court, recognizing the need for law enforcement officials to employ photographic displays in order to quickly apprehend criminals, was unwilling to prohibit their use. *Id.* at 384. Instead, the Court held that convictions based on pretrial photographic identifications may be reversed only when the identification procedures are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* The Court then stated that there was little chance the photographic display had led to the misidentification of Simmons. The bank was well lit during the robbery, the robbers did not wear masks, the witnesses had an opportunity to view the robbers for as much as five minutes, and the witnesses were shown the photographs the day after the robbery while their memories of the event were still fresh. *Id.* at 385.

irreparable misidentification."¹⁸²⁸

In *United States v. Crenshaw*,¹⁸²⁹ the Ninth Circuit considered whether certain pretrial comments by the prosecutor to eyewitnesses impermissibly tainted the reliability of subsequent in-court identifications.¹⁸³⁰ Defendants Gordon and Crenshaw were indicted on charges of armed bank robbery.¹⁸³¹ On the morning of the trial, the prosecutor informed two bank employees, who had witnessed the robbery, that the men they had previously identified in photographic lineups would be in court seated at the defendants' table.¹⁸³² The trial judge made a pre-trial ruling that the prosecutor's comments tainted the reliability of any subsequent identification by the bank employees and refused to allow any in-court identification. Nevertheless, the court allowed the bank employees to indicate which pictures they had previously selected in the photo lineups.¹⁸³³

On appeal, the defendants contended that the photographic identification at trial violated their due process rights because it was tantamount to an in-court identification.¹⁸³⁴ The Ninth Circuit rejected the defendants' argument, stating that the prosecutor's comments did not affect the reliability of the prior photo identifications.¹⁸³⁵ Thus, the court held that the trial court did not abuse its discretion when it permitted the photographic identification at trial.¹⁸³⁶

In *United States v. Barrett*,¹⁸³⁷ the Ninth Circuit addressed the issue of whether a pretrial photographic spread was so impermissibly suggestive that it tainted a bank teller's subsequent in-court identifica-

1828. *Id.* at 384.

1829. 698 F.2d 1060 (9th Cir. 1983).

1830. *Id.* at 1063.

1831. 18 U.S.C. § 2113(a) (1976) provides in pertinent part:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any . . . savings and loan association . . . shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(d) (1976) provides in pertinent part:

Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) . . . assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

1832. 698 F.2d at 1063. The two bank employees previously identified Gordon and Crenshaw from a photograph lineup consisting of one dozen pictures, once shortly after the robbery and again one week prior to trial.

1833. *Id.*

1834. *Id.*

1835. *Id.*

1836. *Id.*

1837. 703 F.2d 1076 (9th Cir. 1983).

tion of the defendant.¹⁸³⁸ Approximately two weeks after the robbery of a savings and loan by a lone, bearded gunman, the teller who was the victim of the crime identified Barrett from a photographic spread prepared by the FBI. The spread consisted of nine photographs of clean-shaven, white men of similar ages with similar features.¹⁸³⁹ The day before trial, the teller was shown the same photographic spread, together with surveillance photos taken during the robbery and two photographs of Barrett wearing a beard and mustache.¹⁸⁴⁰ The teller once again identified Barrett as the robber. Although she was uncertain of her initial photographic identification, the teller made a positive in-court identification,¹⁸⁴¹ and the defendant was subsequently convicted of bank robbery.¹⁸⁴²

The Ninth Circuit held that the photographic spread was not so impermissibly suggestive that it tainted the teller's in-court identification.¹⁸⁴³ The court remarked that all the men in the photo lineup were very similar in appearance, the only perceptible difference being that Barrett was the only suspect wearing dark glasses. The court concluded, however, that this difference was insignificant.¹⁸⁴⁴

The court further held that, even if the photographic spread was somewhat suggestive, the teller's in-court identification was sufficiently trustworthy to justify its admission.¹⁸⁴⁵ The court observed that the

1838. *Id.* at 1084.

1839. *Id.* at 1084-85. The defendant asserted that:

(1) he was the only person in the photographic display wearing dark glasses (the robber had been described as wearing dark glasses); (2) his photograph was one of five in which height lines typical of a booking facility appeared in the background; (3) all the men in the photographic spread were clean-shaven, implicitly indicating that the robber had shaved; and (4) he was the largest person in the photographic spread.

Id.

1840. *Id.* at 1084. The defendant argued that the teller's in-court identification was further tainted when she again viewed the photo lineup and surveillance photographs prior to identifying him in court. This argument was not raised by Barrett at trial; thus, the Ninth Circuit would not consider it on appeal. The court noted, however, that had it considered this argument, it would not have affected its decision with regard to the reliability of the teller's in-court identification. *Id.* at 1084 n.15.

1841. *Id.* at 1084. In addition, the defendant's live-in girlfriend testified that Barrett was the man in the surveillance photo taken during the robbery, and that Barrett had shaved off his beard and mustache on the afternoon of the robbery. *Id.* at 1079-80.

1842. *Id.* at 1079. Barrett was convicted of robbing a federally insured savings and loan association in violation of 18 U.S.C. § 2113(a). *See supra* note 1831.

1843. *Id.* at 1085.

1844. *Id.*

1845. *Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977)). In *Neil v. Biggers*, the Court identified five factors that must be considered when assessing the reliability of in-court identifications. They are:

teller had ample time to view the defendant during the robbery and that handing the robber two clips of bait bills clearly demonstrated her high degree of attention. Moreover, her description of the robber was remarkably accurate and she correctly selected Barrett from nine other similar photos at the pretrial photographic lineup. Finally, only two weeks had passed between the time of the robbery and the teller's pretrial photographic identification.¹⁸⁴⁶ Consequently, the court concluded that the reliability of the in-court identification outweighed any suggestiveness in the pretrial identification procedures.¹⁸⁴⁷

In *United States v. Kessler*,¹⁸⁴⁸ the Ninth Circuit considered whether a showup at the scene of a bank robbery was so impermissibly suggestive that the eyewitness identification testimony of bank tellers should have been suppressed.¹⁸⁴⁹ Within an hour after the commission of a bank robbery, defendant Booth was apprehended on the basis of descriptions of the robber given by the tellers in response to identification questionnaires. The post-showup questionnaires yielded more precise and accurate descriptions of the robber than those given prior to the showup.¹⁸⁵⁰ At trial, Booth contended the showup was impermissibly suggestive, and the district court suppressed the eyewitness identification testimony.¹⁸⁵¹

On appeal, Booth advanced three principal arguments in support of his contention that the trial court's suppression order should be upheld.¹⁸⁵² First, he asserted that the police officers' use of the word "sus-

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

1846. 703 F.2d at 1085.

1847. *Id.*

1848. 692 F.2d 584 (9th Cir. 1982).

1849. *Id.* at 585.

1850. *Id.* at 585-86.

1851. *Id.* at 585.

1852. *Id.* at 586. This case was before the Ninth Circuit on one other occasion. *Id.* at 585. See *United States v. Booth*, 669 F.2d 1231 (9th Cir. 1981). There, the trial court had suppressed the eyewitness identification testimony of the bank tellers, holding the showup was improper because no exigent circumstances existed to justify handcuffing the defendant and returning him to the bank. *Id.* The Ninth Circuit held the propriety of a showup identification does not depend upon a showing of exigent circumstances. *Id.* Consequently, the court remanded the case to the district court with instructions to determine whether the showup procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). See *supra* note 1827 for a discussion of *Simmons*.

pect" in reference to him was in itself suggestive.¹⁸⁵³ The defendant further argued that his display in handcuffs surrounded by a large number of police officers was impermissibly suggestive.¹⁸⁵⁴ Finally, Booth contended that the disparity in the answers to the pre- and post-showup identification questionnaires demonstrated that the showup was impermissibly suggestive.¹⁸⁵⁵

Prior to considering Booth's contentions, the Ninth Circuit noted that it is almost impossible to avoid some degree of suggestiveness in a showup at the scene of a crime.¹⁸⁵⁶ The court further stated, however, that showups are not objectionable unless "the 'procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'"¹⁸⁵⁷

The Ninth Circuit held that the procedure used for the showup in this situation did not justify suppression of the subsequent identification testimony.¹⁸⁵⁸ The court stated that the mere reference to Booth as a "suspect" was not an impermissible suggestion,¹⁸⁵⁹ but cautioned that use of this term should be avoided in order to eliminate the possibility that witnesses will draw adverse inferences from its use.¹⁸⁶⁰ The court also noted that the use of handcuffs and other indicia of custody do not invalidate a showup where they are "necessary for the prompt and orderly presentation of the suspect consistent with protection of the officers and witnesses."¹⁸⁶¹ In support of its conclusion, the court of appeals observed that the eyewitnesses had been instructed to draw no inferences from the fact that Booth was in handcuffs, that Booth was only displayed for a short period of time, and that the presence of a large number of officers at the showup was justified, given the type of crime which had just occurred.¹⁸⁶² The Ninth Circuit further held the fact that differences existed between the pre- and post-identification questionnaires could not be used to show impermissible suggestiveness¹⁸⁶³ because one of the principal functions of a showup is to elicit a

1853. 692 F.2d at 585.

1854. *Id.*

1855. *Id.*

1856. *Id.*

1857. *Id.* (citing *United States v. Booth*, 669 F.2d 1231, 1239 (9th Cir. 1981) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968))). See *supra* note 1827 for a discussion of *Simmons*.

1858. 692 F.2d at 586.

1859. *Id.*

1860. *Id.*

1861. *Id.*

1862. *Id.*

1863. *Id.*

more precise description of the suspect.¹⁸⁶⁴

Finally, the Ninth Circuit considered Booth's assertion that the initial descriptions of the robber were insufficient to justify the use of a showup procedure.¹⁸⁶⁵ The court found this argument unpersuasive, observing that victims are likely to be in shock shortly after a crime occurs and, therefore, precise recollections cannot be expected.¹⁸⁶⁶ In addition, the court noted that the witnesses were questioned by FBI agents after filling out the initial questionnaires and prior to the showup.¹⁸⁶⁷ These interviews yielded more detailed descriptions which led to the arrest of the defendant.¹⁸⁶⁸ The Ninth Circuit concluded that, under the circumstances, use of the showup procedure was proper.¹⁸⁶⁹

In *United States v. Burnette*,¹⁸⁷⁰ the Ninth Circuit again confronted the issue of whether a pretrial showup, at which the defendant was identified, was conducted in such an impermissibly suggestive manner that the admission of the witness' subsequent in-court identification testimony denied the defendant due process of law.¹⁸⁷¹ A lone black gunman wearing a ski mask robbed a savings and loan. The robber then removed the mask and fled on foot. A bank customer, chasing the robber, enlisted the aid of a passing truck driver who responded by blocking the robber's path with his truck. The robber was forced to pass in front of the truck, enabling the driver to see his face for a brief period of time. The driver then pursued the robber on foot. When they were approximately four feet apart, the robber turned and fired a shot at the truck driver. The driver was not hit, but was able to view the gunman's face for approximately four seconds. The bank customer continued to chase the robber and saw him enter a waiting automobile. A pedestrian heard the customer's shouts and noted the license plate number of the vehicle.¹⁸⁷²

The automobile was located by the police an hour later at a local

1864. *Id.* (citing *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977) (level of certainty demonstrated at the confrontation is an indicia of reliability to be weighed against the corrupting effect of suggestive pretrial identification procedures)). See *infra* note 1881 for a discussion of *Manson*. See also *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), discussed *supra* at note 1845.

1865. 692 F.2d at 586.

1866. *Id.*

1867. *Id.*

1868. *Id.*

1869. *Id.*

1870. 698 F.2d 1038 (9th Cir.), *cert. denied*, 103 S. Ct. 2106 (1983).

1871. *Id.* at 1045.

1872. *Id.* at 1042-43.

motel. After a short surveillance, the suspect was located and taken into custody. An FBI agent then contacted the truck driver and asked if he would accompany the agent to the motel to identify the man who had fired at him. When he arrived at the motel, the truck driver saw a black man in handcuffs, but was not asked to identify him. He then accompanied the agent to the police station where he saw a different black male in handcuffs sitting in the back seat of a patrol car. Without any questioning or prompting by the police, the truck driver immediately identified the man as the gunman he had chased following the robbery,¹⁸⁷³ and Burnette was subsequently charged with armed bank robbery.¹⁸⁷⁴

At trial, the defendant moved to suppress the truck driver's in-court identification testimony on the ground that the pretrial showup was so unnecessarily suggestive that it denied him due process of law.¹⁸⁷⁵ The trial court denied the defendant's suppression motion and Burnette was subsequently convicted.¹⁸⁷⁶

The Ninth Circuit assumed *arguendo* that the pretrial showup was unnecessarily suggestive,¹⁸⁷⁷ but further noted that due process does not require the suppression of all in-court identifications following suggestive pretrial identifications.¹⁸⁷⁸ The court of appeals stated that the applicable test is whether, in light of the totality of the circumstances, the pretrial identification procedure was so suggestive as to result in a substantial likelihood of misidentification.¹⁸⁷⁹ "It is the likelihood of misidentification which violates a defendant's right to due process,"¹⁸⁸⁰ and, therefore, if the identification possesses sufficient aspects of reliability, due process is not violated by suggestive pretrial

1873. *Id.* at 1043-44.

1874. *Id.* at 1042. Burnette was charged with violating 18 U.S.C. § 2113(a) and 18 U.S.C. § 2113(d). See *supra* note 1831.

1875. 698 F.2d at 1045. The defendant also challenged the manner in which the prosecution solicited the in-court identification. The truck driver was asked by the prosecutor if he could identify the black male he had pursued. Burnette was the only black man present in the courtroom. The Ninth Circuit stated that the prosecutor's question was not improper because there was never any dispute that the man chased by the truck driver was black and, therefore, Burnette was not prejudiced by the question. *Id.* at 1045 n.10.

1876. *Id.* at 1044.

1877. *Id.* at 1045.

1878. *Id.* (citing *United States v. Field*, 625 F.2d 862, 866 (9th Cir. 1980) (due process is not violated by suggestive identification procedures if the identification possesses sufficient aspects of reliability)).

1879. *Id.* (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). See *supra* note 1827 for a discussion of *Simmons*.

1880. 698 F.2d at 1045 (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)).

identification procedures.¹⁸⁸¹

The court concluded that the testimony of the truck driver was sufficiently reliable to warrant its admission.¹⁸⁸² The court based its conclusion on the witness' clear and unobstructed view of the defendant, his attentiveness given the seriousness of the situation, his accurate description of both the defendant and the gun prior to the showup, the witness' high degree of certainty that the defendant was the man who had shot at him, and the passage of less than two hours between the crime and the showup.¹⁸⁸³

D. Bail

Persons charged with non-capital offenses must be released from custody pending trial if it has been determined by a judicial officer that the bailee will appear on the appointed trial date.¹⁸⁸⁴ This release will

1881. *Id.* (citing *Manson v. Braithwaite*, 432 U.S. 98, 106 (1977)). In *Manson*, an undercover narcotics agent purchased drugs on an informant's tip and then returned to the police station. The agent described the suspect to a fellow officer who recognized the description as being similar to that of an individual he had seen in the area of the narcotics sale on numerous occasions. The officer showed a photograph of the man to the agent, who identified the person in the photograph as the man who had sold him the narcotics. *Manson v. Braithwaite*, 432 U.S. 98, 99-101 (1977).

In a state criminal trial, the agent made an in-court identification and testified he had identified a photograph of the defendant. The defendant was subsequently convicted on narcotics charges. *Id.* at 102. The defendant then filed a petition for a writ of habeas corpus in federal district court alleging that admission of the identification testimony had deprived him of due process. The district court dismissed the petition; however, the Second Circuit reversed on the ground that evidence of the photograph should have been excluded because the examination of the single photograph was unnecessary and suggestive. *Id.* at 103-04.

The United States Supreme Court granted certiorari and reversed the Second Circuit. *Id.* at 117. The Court stated that, even though the photographic identification procedure was suggestive because only one photograph was used and unnecessary because there were no exigent circumstances preventing the use of multiple photographs, suppression of evidence is justified only if a "substantial likelihood of irreparable misidentification" exists. *Id.* at 109-10. The Court concluded that no such possibility of misidentification existed based on the undercover agent's opportunity to view the defendant for a significant length of time, the agent's special training as an observer, the accuracy of the agent's description of the defendant, the agent's level of certainty, and the relatively short period of time between the crime and the photographic identification. *Id.* at 114-16.

1882. 698 F.2d at 1045-46. The court further stated the suggestive pretrial identification procedure did not influence the truck driver's identification of the defendant, noting that the truck driver had seen another black male in handcuffs at the motel and was immediately aware that the man was not the robber he had pursued earlier that day. In addition, the driver identified the defendant at the showup prior to any prompting or questioning by the police. *Id.* at 1046.

1883. *Id.*

1884. 18 U.S.C. § 3146(a) (1976) states in pertinent part:

Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial

continue throughout the trial unless it is determined that the bailee's continued freedom will disrupt the judicial process.¹⁸⁸⁵

In *United States v. Rhodes*,¹⁸⁸⁶ the Ninth Circuit upheld the trial court's decision to increase the defendant's bond and remand him to custody following a determination that his conduct threatened to disrupt the ongoing judicial proceedings.¹⁸⁸⁷ Dudley and a co-defendant were charged with conspiracy in connection with the possession and distribution of stolen mail.¹⁸⁸⁸ During trial, following a noon recess, Dudley approached the prosecution table and proceeded to make menacing statements to the prosecutor, a witness, and several inspectors from the Postal Service.¹⁸⁸⁹ The court had also received information that prior to trial Dudley had made threats to the prosecutor, and that threatening telephone calls had been received by witnesses and one postal inspector.¹⁸⁹⁰ Based on this information, the Ninth Circuit held that the trial court acted within its authority to prevent further interference by Dudley.¹⁸⁹¹

on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines . . . that such a release will not reasonably assure the appearance of the person as required.

1885. FED. R. CRIM. P. 46(b) provides in pertinent part: "A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions . . . are necessary . . . to assure that his conduct will not obstruct the orderly and expeditious progress of the trial."

1886. 713 F.2d 463 (9th Cir.), *cert. denied*, 104 S. Ct. 535 (1983).

1887. *Id.* at 468. *See Carbo v. United States*, 288 F.2d 282, 285 (9th Cir. 1961) (bail may be revoked if "there is reason to believe that a trial actually in progress may be disrupted . . . by [defendant's] activities").

1888. 18 U.S.C. § 371 (1976) states in pertinent part: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . or both."

1889. 713 F.2d at 468. Dudley's statements included, "I am going to clean this up when this [sic] all over." *Id.*

1890. *Id.* At one point, Dudley told the prosecutor "'that [the prosecutor] should watch [his] family.'" *Id.*

1891. *Id.* *See, e.g., United States v. Meinster*, 481 F. Supp. 1117 (S.D. Fla. 1979), where the district court listed the following factors to be considered by the trial courts in a revocation determination:

- (1) The trial court should determine whether a defendant has a motive to disrupt the trial;
- (2) The trial court should weigh the evidence carefully to determine if a defendant truly intends to disrupt the proceedings;
- (3) The trial court should determine whether defendant's behavior fits into a known pattern; and
- (4) The trial court should weigh the prejudicial effect the disruption would have on the proceedings.

Id. at 1123-24.

Dudley contended that the trial court acted improperly when it revoked his bond without a hearing.¹⁸⁹² The Ninth Circuit rejected this claim, relying upon its ruling in a previous case that no full hearing is required when the trial judge has stated his reasons for revocation, and defense counsel has been given an opportunity to rebut the charges.¹⁸⁹³

In *Rhodes*, following the prosecution's presentation of evidence of Dudley's conduct toward the court, defense counsel was allowed to answer the charges. The Ninth Circuit found that all pertinent facts were before the trial court when it made its revocation determination.¹⁸⁹⁴ Therefore, the Ninth Circuit held that sufficient evidence existed to support the trial court's finding that Dudley's conduct threatened the orderly progress of the trial.¹⁸⁹⁵

E. Defendant's Right to be Present at Pretrial Proceedings

Under Rule 43 of the Federal Rules of Criminal Procedure, a defendant's presence is generally required at every stage of the proceedings against him.¹⁸⁹⁶ This rule affords a broader protection than that guaranteed under the sixth amendment right to confrontation or under the fifth amendment right to due process.¹⁸⁹⁷

In *United States v. Christopher*,¹⁸⁹⁸ the Ninth Circuit vacated a de-

1892. 713 F.2d at 468.

1893. *Id.* (citing *United States v. Stroud*, 474 F.2d 737, 738 (9th Cir.) ("At the least, the judge should have stated his reasons and given Stroud's counsel a chance to rebut them."), *cert. denied*, 412 U.S. 930 (1973)).

1894. *Id.* at 469.

1895. *Id.*

1896. FED. R. CRIM. P. 43 states:

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(c) Presence Not Required. A defendant need not be present in the following situations:

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

1897. [D]efendants have an explicit, unqualified right under Rule 43 of the Federal Rules of Criminal Procedure to be present at their jury impaneling, as well as at all other stages of the trial. . . . Rule 43 embodies the right to be present derived from the Sixth Amendment Confrontation Clause, the Due Process Clause of the Fifth and Fourteenth Amendments, and the common law privilege of presence. *United States v. Alessandrello*, 637 F.2d 131, 138 (3rd Cir. 1980), *cert. denied*, 451 U.S. 949 (1981).

1898. 700 F.2d 1253 (9th Cir.), *cert. denied*, 103 S. Ct. 2436 (1983).

fendant's conviction because he had been arraigned in his absence.¹⁸⁹⁹ Defendant Michel and others were cited after refusing to leave federal property while promoting passage of the California Marijuana Initiative.¹⁹⁰⁰ When Michel was unaccountably absent at his misdemeanor arraignment,¹⁹⁰¹ the court suggested that it was appropriate to proceed without him pursuant to Rule 43.¹⁹⁰² No objection was made at that time by Michel's attorney.¹⁹⁰³ On appeal, Michel contended that he was improperly arraigned in his absence.¹⁹⁰⁴

The Ninth Circuit stated that Rule 43 made no provision for the arraignment of a defendant without either his presence or his written consent to proceed in his absence,¹⁹⁰⁵ and that only the defendant's presence could adequately assure the court that he had been apprised of the proceedings against him.¹⁹⁰⁶

F. Defendant's Right to Discovery

There is no general constitutional right to pretrial discovery in criminal cases.¹⁹⁰⁷ Pretrial discovery is required, however, if the accused specifically requests prosecutorial evidence favorable to his defense.¹⁹⁰⁸ Failure to comply with such a request is a violation of due

1899. *Id.* at 1262.

1900. *Id.* at 1256. Defendant and several associates set up a table on federal building property in Los Angeles. The group sought to distribute information, solicit petition signatures, and register voters. Members of the group announced their intention to stay on the premises for seventeen days. *Id.* Michel was cited for being present on federal property after hours in violation of 41 C.F.R. § 101-20.302 (1981), which states in pertinent part: "Property shall be closed to the public during other than normal working hours," and 41 C.F.R. § 101-20.315 (1981), which provides that "[w]hoever shall be found guilty of violating any rule or regulation in this Subpart . . . while on any property under the . . . control of GSA is subject to a fine of not more than \$50 or imprisonment of not more than 30 days, or both."

1901. 700 F.2d at 1256. The court questioned Michel's attorney about Michel's whereabouts, but no one could account for his absence. *Id.*

1902. *Id.* See FED. R. CRIM. P. 43(c)(2), *supra* note 1896.

1903. 700 F.2d at 1256.

1904. *Id.*

1905. *Id.* at 1262. The court cited *United States v. Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972), in which the court stated that "no defendant can be tried until after he personally has entered a plea to the charge." *Id.* at 1209. The defendant in *Tortora*, however, had previously made court appearances in the case. The court held that the defendant had been adequately notified and had thereby waived his right to be present at his trial. *Id.* at 1209-10.

1906. 700 F.2d at 1262.

1907. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (due process clause silent on amount of discovery that must be afforded defendant in criminal case).

1908. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

In *Brady*, defendant Brady and an accomplice, Boblit, were arrested for murder com-

process.¹⁹⁰⁹

In *United States v. Bennett*,¹⁹¹⁰ the Ninth Circuit considered whether an accused is entitled to discover grand jury transcripts.¹⁹¹¹ Defendant Bennett was convicted of fraud,¹⁹¹² conspiracy,¹⁹¹³ tax evasion,¹⁹¹⁴ theft and embezzlement.¹⁹¹⁵ On appeal, Bennett sought to obtain grand jury transcripts, asserting he could not ascertain whether prosecutorial misconduct had occurred without them.¹⁹¹⁶

The Ninth Circuit held that the district court had properly denied

mitted in the course of a robbery, and tried separately in state proceedings. Brady's accomplice made an extrajudicial confession admitting the homicide. Boblit's confession was suppressed by the prosecution, despite Brady's request to examine Boblit's extrajudicial statements. Brady did not learn of Boblit's confession until after Brady was convicted of first degree murder. *Id.* at 84-85.

The trial court denied Brady's petition for post-conviction relief. On appeal, however, the Maryland Court of Appeals held that the prosecution's suppression of the exculpatory evidence denied Brady due process of law. *Id.* at 85. The Supreme Court affirmed the Maryland high court's ruling, *id.* at 90-91, holding that the government's suppression of evidence favorable to the accused, after it has been requested by the defendant, violates due process when the evidence is material to the establishment of the defendant's guilt or innocence. *Id.* at 87.

1909. *Id.* It is immaterial that the evidence is suppressed in good faith.

1910. 702 F.2d 833 (9th Cir. 1983).

1911. *Id.* at 836.

1912. 18 U.S.C. § 1001 (1976) provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

1913. 18 U.S.C. § 371 (1976) provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof . . . , and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

1914. 26 U.S.C. § 7206(l) (1976) provides:

Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

1915. 18 U.S.C. § 665(a) (1976) provides in pertinent part:

Whoever, being an officer, director, agent, or employee of . . . any agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance . . . shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

1916. 702 F.2d at 836.

the defendant's discovery request.¹⁹¹⁷ The court stated that Bennett had not met his burden of showing a "particularized need" for the transcripts which outweighed the need for grand jury secrecy.¹⁹¹⁸

In *Baumann v. United States*,¹⁹¹⁹ the Ninth Circuit considered whether the government had unconstitutionally failed to disclose material, exculpatory evidence to the defendant.¹⁹²⁰ Defendant Baumann was indicted on four counts of mail fraud¹⁹²¹ and aiding and abetting¹⁹²² arising out of the fraudulent sale of "fenceposted" land sale contracts.¹⁹²³ He was found guilty on all counts,¹⁹²⁴ and his conviction was affirmed on appeal.¹⁹²⁵ The defendant's subsequent petition in *propria persona* for post-conviction relief was summarily dismissed by the district court.¹⁹²⁶

1917. *Id.*

1918. *Id.* (citing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) (no "particularized need" for disclosure of grand jury transcript because it dealt with subject matter generally covered at trial)).

1919. 692 F.2d 565 (9th Cir. 1982).

1920. *Id.* at 572.

1921. 18 U.S.C. § 1341 (1976) provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

1922. 18 U.S.C. § 1342 (1976) provides in pertinent part:

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department, any scheme or device . . . or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to such fictitious, false or assumed title, name, or address, or name other than his own proper name, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

1923. 692 F.2d at 569. A "fenceposted" contract is a contract for the sale of land made out to a person who is not expected to make payments on it. The contract is then sold to an investor or pledged as security for a loan. *Id.*

1924. *Id.* Baumann was fined \$1,000 and sentenced to a five year prison term on each of the four counts, two of which were to run consecutively. However, the district court reduced his sentence to five years by ordering that all sentences run concurrently. *Id.*

1925. *Id.*

1926. *Id.* The district court judge consulted with a magistrate regarding Baumann's petition for post-conviction relief. The magistrate recommended the defendant's petition be dismissed on the ground that 28 U.S.C. § 2255 "does not permit a party to relitigate issues

Appealing the dismissal of his petition, Baumann contended that the district court had erred in failing to order an evidentiary hearing on his claim that the prosecution had suppressed exculpatory evidence¹⁹²⁷ in violation of his due process rights.¹⁹²⁸ The defendant alleged that the prosecutor knew investors testifying against Baumann had received legitimate periodic contract payments, rather than fraudulent payments resulting from the "fenceposted" land sale scheme, and that the prosecutor failed to disclose this information to the jury.¹⁹²⁹ The defendant did not allege, however, that the prosecution relied on perjured testimony or that the government failed to respond to a specific pretrial discovery request.¹⁹³⁰

The Ninth Circuit stated that failure to disclose the exculpatory material would be a due process violation only if the "omitted evidence would have created a reasonable doubt that otherwise did not exist."¹⁹³¹ Pointing out that the prosecution's case against Baumann depended upon circumstantial evidence that Baumann brokered the "fenceposted" contracts, the court concluded that evidence showing that the contracts were legitimate and not "fenceposted" would have created a reasonable doubt as to his guilt.¹⁹³² The record did not conclusively demonstrate that Baumann's claim lacked merit justifying summary dismissal.¹⁹³³ Consequently, the Ninth Circuit reversed the dismissal of Baumann's petition and remanded for an evidentiary hearing.¹⁹³⁴

that were or could have been raised on direct appeal." *Id.* The district court then dismissed the petition. *Id.*

1927. *Id.* at 568.

1928. *Id.* at 572 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). See *supra* note 1908 and accompanying text.

1929. 692 F.2d at 572. In his brief on appeal, Baumann included letters which he claimed demonstrated that the contract underlying one of the counts of which he was convicted was legitimate. Baumann further alleged the prosecution had possession of both of these letters at the time of trial. The court of appeals refused to rule on Baumann's argument because it had not been raised initially in the trial court. However, the court stated that the issue of whether the prosecution had the letters in its possession before trial and failed to disclose them to the defense should be considered on remand. *Id.* at 573.

1930. *Id.* at 572.

1931. *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976) (failure to disclose exculpatory evidence requires the verdict be set aside only if error influenced the jury)).

1932. *Id.* The Ninth Circuit noted Baumann had not demonstrated that any *Brady* material had been suppressed, but recognized that he had identified specific exculpatory evidence which he claimed the prosecutor had knowledge of and failed to disclose. Therefore, his claim was not "so patently frivolous or incredible as to justify summary dismissal." *Id.* at 573.

1933. *Id.* at 572.

1934. *Id.* at 573.

In *United States v. Gee*,¹⁹³⁵ the Ninth Circuit considered whether the government's failure to provide Gee with a transcript of two tape-recorded conversations involving Gee, his co-defendants, and an undercover agent constituted a violation of the defendant's due process rights, as well as Rule 16(a) of the Federal Rules of Criminal Procedure.¹⁹³⁶ The taped conversations were played for defense counsel in advance of trial and the prosecution provided Gee with a copy of the tapes. Pursuant to Rule 16, the defendant subsequently requested a transcript of his tape-recorded statements,¹⁹³⁷ but was informed by the government that he not only had access to all the tapes, but had already been given a copy of all transcripts in existence at that time.¹⁹³⁸

At trial, the prosecution produced a transcript of the tape-recorded conversations. Gee objected to the jury's use of the transcript, claiming he had not been supplied with a copy although he had made a timely request.¹⁹³⁹ Ruling the government was not required to prepare or produce the transcript prior to trial, the trial court denied Gee's motion for a new trial.¹⁹⁴⁰

1935. 695 F.2d 1165 (9th Cir. 1983). Gee was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 (1982), which provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter [on drug abuse prevention] is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

1936. 695 F.2d at 1167-69. FED. R. CRIM. P. 16(a)(1)(A) provides:

Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged.

FED. R. CRIM. P. 16(a)(1)(C) further provides:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

1937. 695 F.2d at 1166. Both the originals and copies of the tapes were of poor quality. Gee, therefore, requested that the government transcribe the tapes and provide him with a copy of the transcript. *Id.* at 1166-67.

1938. *Id.* at 1166. A question arose concerning whether the transcript existed at the time Gee made his discovery request. The trial court, however, made no clear finding as to when the transcript was prepared. *Id.* at 1167.

1939. *Id.* at 1166-67.

1940. *Id.* at 1167.

On appeal, the Ninth Circuit held that the failure to provide the defendant with a transcript of his tape-recorded statements was not a violation of Rule 16 because Gee had been given an opportunity to listen to the original tapes and had been provided with copies of them.¹⁹⁴¹ The court also found that, even if a violation of Rule 16 had occurred, Gee had not demonstrated that the failure to provide him with a transcript had prejudiced his rights.¹⁹⁴²

The Ninth Circuit further held that, even if the prosecution had violated Rule 16 and caused some prejudice to the defendant, it did not constitute reversible error because the district judge had not abused his discretion by allowing use of the transcripts.¹⁹⁴³ Gee was given ample opportunity to review the transcript before it was given to the jury. Moreover, the jury was removed from the courtroom while the tape and transcript were compared for accuracy. In addition, the transcript was retrieved from the jury immediately after the tape was played, and the trial judge instructed the jury that they could only consider the tape as evidence.¹⁹⁴⁴ The court limited its holding, however, by concluding that "wrongful behavior by the Government in failing to fully comply with Rule 16 might well compel reversal [in] only slightly different factual situations."¹⁹⁴⁵

In a concurring opinion, Judge Fletcher concluded that the government's failure to produce the transcript violated Rule 16.¹⁹⁴⁶ The judge reasoned that the evidence tag attached to the transcript, as well as the government's own statements, clearly established that the transcript was prepared prior to Gee's discovery request.¹⁹⁴⁷ In addition, the transcript represented information concerning the government's

1941. *Id.* The court found no reason why Gee could not have produced his own transcript, just as the prosecution had done. *Id.*

1942. *Id.* at 1168. The court noted: (1) neither the judge nor the jury expressed any difficulty in understanding the tape; (2) the jury did not rely on the transcript when listening to the tape a second time; and (3) the trial court had found that the tape had been available to the defendant. *Id.*

1943. *Id.* The Ninth Circuit stated: "The trial court, when faced with a violation of Rule 16, may 'order such [offending] party to permit the discovery, . . . grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such order as it deems just under the circumstances.'" *Id.* (quoting FED. R. CRIM. P. 16(d)(2)).

1944. *Id.* at 1167-68. The court stated that the only relief to which the defendant might have been entitled was a continuance. None was requested by the defendant, however, nor did defense counsel ever suggest to the court that additional time was necessary to prepare an adequate defense. *Id.* at 1169.

1945. *Id.*

1946. *Id.* at 1170-71 (Fletcher, J., concurring) (citing FED. R. CRIM. P. 16(a)(1)(A), (C)). See *supra* note 1935.

1947. 695 F.2d at 1170-71 (Fletcher, J., concurring).

version of the tapes, which was relevant and significant to Gee's defense.¹⁹⁴⁸ Judge Fletcher concurred in the judgment, however, because Gee had failed to demonstrate that prejudice to his defense had resulted from the government's failure to produce the document.¹⁹⁴⁹

1948. *Id.* at 1170 (Fletcher, J., concurring).

1949. *Id.* at 1171 (Fletcher, J., concurring).

